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Not Ready for Prime Time: Canada's Proposed New Securities Regulator

In the current debate over a new securities regulator, one fact stands out: in its current form, it will not be Canada's long-sought-after single national regulator.

Harvey Naglie

About The Author

Harvey Naglie
has spent his entire 35-year career in financial services, working in both the public and private sector. Most recently, he served as a Senior Policy Advisor with the Ontario Ministry of Finance.

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Daniel Schwanen
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The Study In Brief

Over the years, many voices in the securities industry, with the support of politicians and academics, have advocated for a single national regulator that would discharge pan-Canadian capital-market oversight more effectively and more efficiently than the prevailing system of multiple provincial regulators. This assertion rests, not unreasonably, on the proposition that a single national regulator administering a single securities statute and operating with a single fee schedule would eliminate the duplication, delays and diseconomies inherent in a system consisting of 13 regulators, 13 securities acts and 13 fee schedules. Nevertheless, repeated efforts over the years to establish a national securities regulator have all failed; according to some, however, this may be about to change.

The federal government, together with five provinces (Ontario, British Columbia, Saskatchewan, Prince Edward Island and New Brunswick) and one territory (Yukon) are currently developing and planning to launch, before the end of next year, a new securities regulator. According to the participating jurisdictions, this new regulator, the Capital Markets Regulatory Authority (CMRA), will streamline Canada's capital markets regulatory framework to better protect investors, foster more efficient capital markets and manage systemic risk. As a result, the Canadian public expects that the CMRA, once launched, will feature many of the attributes and offer many of the benefits that have typically been associated with a single national regulator. Unfortunately, these expectations are destined to be disappointed, if not betrayed, because the CMRA in its current form is not, and will not be able to operate as, a single national regulator.

While it is true that the original objective of this most recent securities regulatory reform initiative was the creation of a single national regulator, a combination of constitutional imperatives and political choices precluded that outcome. As a consequence, the CMRA is a significantly compromised Plan B that will lack the ability to unilaterally impose its regulatory authority across the country, a fundamental feature, if not prerequisite, of a single national regulator. Furthermore, there is no assurance or even likelihood that the key provinces of Quebec and Alberta will join the new regulator following its launch. In its current form, it is not even obvious that the CMRA will constitute an improvement relative to Canada's existing securities regulatory system. Canada's provincial securities regulators have, in recent years, collaborated to create a relatively high degree of harmonization in securities regulation, which has fostered vibrant and resilient capital-market growth in Canada. While differences among jurisdictions persist, particularly with respect to investor protection initiatives, it would be more than unfortunate if the introduction of the CMRA upsets this regulatory equilibrium and jeopardizes the positive outcomes and greater cooperation that have been achieved.

There is a legitimate question as to whether the CMRA, in its current form, is ready for prime time. With so much at stake, it is vital that the participating jurisdictions provide more and better information about what exactly the Canadian public will be getting and what exactly it will be sacrificing or putting at risk if the new regulator launches as planned. To do this in a meaningful way, the participating jurisdictions need to put the brakes on the current initiative and defer its launch pending an independent review and analysis of the CMRA, as it is currently constituted.

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Efforts to replace Canada's decentralized system of provincial securities regulators with a single national regulator go back to the 1930s. We are now in the midst of another such effort.

Unlike earlier attempts, however, many observers believe that the current initiative will finally be the one that culminates in a new securities regulator for Canada. This outcome, to the extent that it is realized, can only be achieved at the price of accepting many significant concessions and trade-offs. The implications of these concessions and trade-offs portend a compromised and flawed new regulator.

Over the years, the securities industry, with the support of politicians and academics, has regularly asserted that a single national regulator would discharge pan-Canadian capital-market oversight more effectively and more efficiently than the prevailing system of multiple provincial regulators. This assertion rests on the proposition that a single national regulator administering a single securities statute and operating with a single fee schedule would eliminate the duplication, delays and diseconomies of the current system consisting of 13 regulators, 13 securities acts and 13 fee schedules. The logic of this proposition is very compelling. Nevertheless, repeated efforts over the years to establish a national securities regulator have all failed and the regulation of securities in Canada remains an exclusive provincial jurisdiction.

This history of frustrated reform initiatives may partially account for the air of anticipation surrounding the proposed launch, as early as next year, of a new securities market regulator in Canada. Christened the Capital Markets Regulatory Authority (CMRA), this new securities regulator is being supported and developed by the federal government, five provinces (Ontario, British Columbia, Saskatchewan, Prince Edward Island and New Brunswick) and one territory (Yukon). Conditioned by the assurances of the jurisdictions participating in the CMRA,[1] the Canadian public anticipates that the launch of this regulator will herald a new era of more effective and more efficient capital-markets regulation in this country. Unfortunately, the expectations associated with the new regulator will likely lead to disappointment. Constitutional exigencies and political realities have so compromised the version of the new regulator now scheduled to launch next year that it does not have the capacity to deliver the anticipated efficiency and effectiveness dividends. The public's high expectations and the participating jurisdictions' assurances effectively assumed that the CMRA would operate like a single national securities regulator. However, the CMRA, as currently

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1 Memorandum of Agreement Regarding the Co-operative Capital Markets Regulatory System, September 8, 2014: the new regulator will operate in a manner that will "foster more efficient and globally competitive markets in Canada and facilitate the raising of capital from investors across Canada and internationally through more integrated markets governed by innovative, responsive and flexible regulation on the basis of common standards reflected in co-operatively developed regulations consistently applied."

proposed is not, and if launched as is, will not be a single national securities regulator and will not be able to operate as one.

The ultimate goal of all the efforts to reform Canada's securities regulatory framework, including the current one, have been to replace Canada's system of multiple provincial securities regulators with a single national regulator. The prevailing consensus is that a single national regulator would be unambiguously superior to a securities regulatory framework featuring multiple provincial regulators. In every previous reform initiative, once it became clear that a single national regulator was not achievable, the justification for persevering disappeared and the effort was abandoned. This time, however, despite rejections from most of the provinces and territories, including Alberta and Quebec, and notwithstanding the consequent discord, the jurisdictions participating in the CMRA have decided to proceed with the implementation of this new and untested sub-national regulator.

The determination of the participating jurisdictions to launch the CMRA would be justified if they had demonstrably established that its introduction would improve securities regulation in Canada. While the unambiguous superiority of a single national regulator may be obvious, the CMRA, in its current form, is not a national regulator. Consequently, the case that the CMRA will constitute an improvement relative to the existing regulatory system is not obvious and, to date, the participating jurisdictions have not made that case. This is a problem. Canadians are a little more than a year away from the introduction of the CMRA and its participants and sponsors have yet to put forward a convincing case that in its current form it will operate as effectively as Canada's existing securities regulatory system, let alone more effectively.

Section I – Past Securities Regulatory Reform Initiatives

Historically, securities regulation in Canada has been developed, administered and enforced by provincial and territorial levels of government without direct federal government involvement. This reflects the "division of powers" set out in Canada's *Constitution Act*.[2] Pursuant to this constitutional division of power, Canada's securities regulatory framework, unique among major federations, does not include a national regulator. Instead, 13 provincial and territorial securities regulators, all applying and enforcing their own *Securities Acts* and levying their own fees, administer securities regulation in their own jurisdictions. In an effort to harmonize rules across the country and promote more consistent regulatory application and enforcement, these provincial regulators have put in place formal and informal communication and co-operation arrangements.

The first attempts to reform Canada's multi-jurisdictional regulatory framework date back more than 80 years, to 1935, when the Royal Commission on Price Spreads recommended the formation of a federal agency to oversee the issuance of securities by federally incorporated companies. Nothing came of this reform proposal or the many others that regularly surfaced over the ensuing eight decades.[3] This recurring pattern

2 Provincial jurisdiction over property and civil rights embraces regulation of trade and industry within the province, including labour relations and the regulation of professions, trading in securities, and manufacturing.

3 The most significant of these initiatives include the Porter Report (1964); the CANSEC Proposal (1967); the Proposal for a Securities Market Law for Canada (1979); the Memorandum of Understanding (1994) and the Revival of 1994 Memorandum of Understanding (1996-7); the Wise Persons Committee (2003); and the Crawford Panel (2006).

of unrequited proposals for securities regulatory reform provides a useful perspective for evaluating the CMRA initiative now under way. While each failed reform effort was unique, they did share important commonalities. For one thing, in virtually every instance, the federal government and Ontario, either individually or acting together, were the jurisdictions that instigated and most aggressively promoted the effort to establish a single national regulator. The consistent support for a national regulator by these two jurisdictions can be easily explained. Federal government support was the natural expression of its longstanding view that, since the supervision of Canada's securities industry was not explicitly assigned to either level of government, the federal government could assert jurisdiction over capital markets.[4] Ontario's support was primarily based on commercial considerations. Ontario government officials anticipated that a more efficient single national regulator would promote growth and increase profitability of the Ontario-based securities industry.

The other provinces and territories almost invariably opposed efforts to establish a single national regulator. Their persistent opposition reflected a general unwillingness to cede constitutional jurisdiction to the federal government and a strong aversion to forgoing the ability to protect – and promote – their local businesses and the revenues they collected from securities fees. Both the pattern and motivation of federal/provincial support for a national regulator has changed little over time and continues to animate the securities regulatory reform debate today.

Provincial and territorial regulators, in response to repeated attempts to supplant their jurisdictional prerogative in favour of a federal-based national regulator, regularly pursued initiatives designed to simplify and standardize securities laws and requirements across jurisdictions. This ongoing collaboration among Canada's provincial and territorial regulators was formalized with the creation of the Canadian Securities Administrators (CSA), a forum designed to co-ordinate the development of a national system of harmonized securities regulation, policy and practice. The CSA relies on the goodwill of its participants to pursue this co-ordination because it does not have a statutory capacity to mandate or sanction provincial or territorial activities. Despite this limitation, the CSA is a mainstay of Canada's current regulatory framework and plays an effective role in facilitating the exchange of information and harmonizing practices and policies across jurisdictions.

On June 11, 2003, in an effort to further streamline the regulation of securities markets in Canada, a steering committee of ministers from Alberta, British Columbia, Saskatchewan, Manitoba, Ontario and Quebec proposed a securities passport system. Under this passport system, a market participant from one jurisdiction would enjoy automatic access to the capital markets of all other participating jurisdictions by obtaining a decision from its provincial regulator that it was in compliance with the requirements of a set of harmonized passport rules. The proposal was widely heralded as a major step forward in streamlining Canada's securities regulatory system. Therefore, many observers were both surprised and disappointed when Ontario opted not to join the passport system, despite the unanimous participation of the other provinces and territories. Ontario's unwillingness to join passport was attributed to its inability to secure a commitment from the other provinces and territories to work toward the establishment of a single

4 "Securities Regulation in Canada: Topical Information for Parliamentarians." Library of Parliament TIPS-130E September 30, 2004.

regulator, administering a single set of securities regulations and charging a single fee.[5] Absent this commitment, Ontario feared that the impetus for reform would be sated and would thereby preclude Canada from ever achieving a single national securities regulatory model.

Section II – Background for the Current Securities Regulatory Reform Initiative

In February, 2008, less than four years after the implementation of the passport system, the government of Canada established a third-party Expert Panel on Securities Regulation to recommend the best way forward to improve securities regulation in Canada. The need and logic to establish a securities review panel at that specific time are not obvious. The passport system was still relatively new and had yet to establish a meaningful track record against which its effectiveness could be fairly measured. Also, despite the havoc that the global financial crisis was then creating in many financial markets around the world, Canadian markets were performing relatively well. Some observers suggest that the proximate impetus for establishing the expert panel was the liquidity crisis that Canada's asset-backed commercial paper (ABCP) market experienced during the financial crisis.[6] While the regulation of ABCP came under provincial securities jurisdiction, federal government intervention and resources had been necessary to resolve the crisis.[7] This costly intervention, combined with a global preoccupation with regulatory reform in the wake of the global financial crisis,[8] may have provided the federal government with an opportunity to advance its agenda to secure a role in securities regulation.

The Expert Panel on Securities Regulation reviewed Canada's securities regulatory system in a very comprehensive and thoughtful manner. It commissioned a series of research studies, consulted with international practitioners, secured relevant legal advice and undertook an extensive consultation process. The expert panel released its final report and recommendations on January 12, 2009, together with a draft *National Securities Act*. It recommended a single national securities regulator for Canada – the Canadian Securities Commission (CSC) – that would administer a new *Federal Securities Act*. The proposed CSC would be a federal institution governed by an independent governance board, appointed by the federal government and accountable to Parliament through the federal finance minister. The CSC would be responsible for policymaking and rulemaking activities as well as regulatory offence investigation and prosecution. An independent adjudicative tribunal would be established to adjudicate securities matters.

The expert panel anticipated that the proposed national model would not be acceptable to all provinces and recommended that the national securities act apply only in those jurisdictions

5 Standing Committee on Finance and Economic Affairs, "Report on the Five-Year Review of the *Securities Act*." Legislative Assembly of Ontario. October, 2004.

6 In an April 15, 2008, Canadian Press article referencing the mid-August, 2007, Canadian financial market meltdown (when approximately $32 billion of non-bank, or third-party, sponsored asset-backed commercial paper was frozen by the inability of the conduits to rollover their maturing notes), finance minister Jim Flaherty said that "a national regulator would [also] provide more transparency for investors. We have 13 securities regulators in Canada, which, quite frankly, makes no sense and makes for a great deal of inefficiency in terms of regulation."

7 The federal government, in co-ordination with the Ontario, Quebec and Alberta governments, provided $4.45 billion in backstops to support the restructuring of ABCP but acknowledged that it would have preferred if the government did not have to provide financial backing.

8 G20 commitment to strengthen financial regulation.

that chose to participate. Wary, however, about the operational challenges that would ensue to the extent that several provinces chose not to participate, it recommended a "market participant opt-in feature." This feature was intended to allow a reporting issuer with a head office in a non-participating province to elect to be governed by the CSC instead of complying with its own province's securities laws. Similarly, a dealer registrant with a head office in a non-participating province could elect to be governed by the CSC, with the effect that it and all its registered salespeople across the country would be governed by the CSC federal regime rather than provincial securities regulatory requirements.

The final report also included several forward-looking recommendations dealing with regulatory accountability, rule-making and investor protection. These included: the principle that regulation be cost-effective, facilitate innovation and maintain the competitiveness of Canada's capital markets; the establishment of an independent panel that would represent the views and interests of small reporting issuers; the establishment of a dedicated service to help investors submit complaints and obtain redress; the creation of a securities regulator with the power to order compensation in the case of a violation of securities law; the establishment of an investor compensation fund; the mandatory participation of registrants in the dispute resolution process of a legislatively designated dispute resolution body; and the establishment of an independent investor panel.[9] It is a testament to the foresight of the expert panel that now, almost 10 years later, these recommendations dealing with accountability, rule-making and investor protection remain both valid and relevant.

After the release of the panel's final report and recommendations, the federal government established the Canadian Securities Transition Office (CSTO) "to assist in the establishment of a Canadian securities regulation regime and a Canadian regulatory authority."[10] In May 2010, the CSTO delivered a draft *Canadian Securities Act* to the federal government. To encourage provincial participation, the CSTO chose to pattern the draft *Canadian Securities Act* more closely after existing provincial securities legislation rather than the draft developed by the expert panel. In this way, the *Canadian Securities Act* reflected the federal government's willingness to pivot from a single national regulator to a hybrid federal-provincial model. However, the federal government offered no evidence that a hybrid model would work better than the existing system. The CSTO draft did maintain the provinces' prerogative to choose whether to join the new regulator, but the draft *Canadian Securities Act* abandoned the market participant opt-in feature. Nevertheless, it was silent about how the hybrid regulator would co-ordinate its activities with non-participating provincial regulators. Lastly, the draft *Canadian Securities Act* eschewed regulatory reform in favour of regulatory familiarity. It did not incorporate any of the expert panel's more progressive recommendations intended to enhance regulatory accountability or strengthen investor protection.

The federal government immediately referred the *Canadian Securities Act* to the Supreme Court of Canada for an advisory opinion on its constitutional validity. The provinces opposed to the legislation, led by the governments of Alberta, Quebec, Manitoba and New Brunswick, argued that the proposed statute was outside the legislative authority of the federal government. The federal

9 Expert Panel on Securities Regulation. "Final Report and Recommendations." January 12, 2009.

10 *Canadian Securities Regulation Regime Transition Office Act* S.C. 2009, c. 2, s. 297. Assented to 2009-03-12.

and Ontario governments, for their part, argued that the statute fell within the federal government's jurisdiction over general trade and commerce. Even before the Supreme Court actually heard the arguments in April 2011, appellate courts in both Quebec and Alberta had already ruled, almost unanimously, that the proposed statute was unconstitutional.

The Supreme Court, in a unanimous decision announced in December 2011, held that the *Canadian Securities Act* was beyond the legislative competence of Parliament. The court did acknowledge that certain provisions of the *Act* designed to control systemic risks, including data collection, raised valid national concerns; but it rejected the federal government's claim that this constituted a sufficient basis to replace provincial regulation of the securities industry. The court went on to note that "a co-operative approach that permits a scheme that recognizes the essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns remains available."[11] The federal government, seizing on this qualification, responded by abandoning the unilateral federal approach that it had been pursuing and absent consultation or analysis began soliciting provincial support for a new, seemingly ad hoc, co-operative regulatory reform initiative.

Section III – Evolution of the Current Securities Regulatory Reform Initiative

It took almost two years of negotiating and arm twisting, , but in September 2013 the federal government was able to announce that it had convinced Ontario and British Columbia to work with it to establish a co-operative capital markets regulatory system (the Co-operative Regulator). The three jurisdictions formalized their collaboration by signing an agreement in principle (AIP) and invited all other provincial and territorial governments to join the effort.[12]

It was entirely consistent for the federal government (looking to extend its jurisdictional reach) and Ontario (wanting to support its securities industry) to be among the charter signatories of the AIP. Less so for British Columbia, a province that had previously steadfastly opposed federal involvement in securities matters. One possible explanation may be that British Columbia was experiencing jurisdictional anxiety prompted by an indication in the 2013 federal budget that the federal government would unilaterally proceed with the establishment of a systemic risk regulator if sufficient provincial support for a co-operative regulator was not achieved.[13] British Columbia may have calculated that a more constrained federal involvement via a federal-provincial co-operative initiative was less objectionable than a standalone federal regulator.[14] It is also possible that British Columbia was capitalizing on the decision of Alberta not to participate in the Co-operative Regulator. Absent the participation of at least one major western province, it was unlikely that the federal government would have been prepared to proceed with what then would have been regarded as an Ontario-centric Co-operative Regulator.

As a result, government officials in British Columbia would have appreciated that the

11 Supreme Court of Canada: Reference re *Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837.

12 September 19, 2013, Agreement in Principle.

13 Federal Budget 2013.

14 In the September 19, 2013, news release marking the agreement to establish a Co-operative Capital Markets Regulator, B.C. Finance Minister Michael de Jong was quoted as saying, "B.C. has consistently supported the concept of a co-operative securities regulatory system that respects constitutional jurisdiction."

participation of their province was critical for the initiative's viability. With this newfound leverage, British Columbia was able to negotiate for itself a governance status in the new regulator equivalent to that of the federal government and Ontario. As a co-equal, British Columbia could sign the Agreement in Principle (AIP) knowing that its capacity to protect the interests of its local market participants from unwanted federal or Ontario interference had been achieved.

The AIP set out the principal components of the proposed Co-operative Regulator. Some of the features of the predecessor unilateral federal model were retained, but many had to be changed or adapted to accommodate the shared federal-provincial character of the proposed Co-operative Regulator. The more important and distinct structural elements set out in the AIP include: uniform virtually identical provincial and territorial legislation to replace existing provincial legislation; complementary federal legislation dealing with criminal matters, systemic risk and national data collection; a single capital markets regulator reporting to an independent board of directors; a Council of Ministers (composed of ministers responsible for capital markets regulation in each participating province and territory and including the federal finance minister) to oversee the regulator and be accountable to participating governments; a voting system allowing any major capital markets jurisdiction (defined as "each provincial or territorial participating jurisdiction representing at least 10 percent of the national gross domestic product derived from financial services i.e., initially only British Columbia and Ontario) to object to a proposed regulation; a fee structure designed to allow the new regulator to fully recover its costs; and transitional funding to those provinces and territories that would lose net revenue as a result of their participation. The regulator would be headquartered in Toronto but be managed by a decentralized regionally based executive team. The AIP targeted a launch date of July 1, 2015, for the Co-operative Regulator.

After signing the AIP, the three participating jurisdictions worked hard to build public support and encourage other provinces and territories to join. In their efforts to promote the Co-operative Regulator, an obvious effort was made by the participating jurisdictions to distinguish it from the previous unilateral federal initiative. Nevertheless, when they itemized the prospective benefits of the proposed Co-operative Regulator, their assurances were rarely tempered by this important distinction. Virtually all the purported advantages that had been attributed to the unilateral federal initiative featuring a single national regulator were co-opted, without qualification, into the narrative promoting the proposed Co-operative Regulator.

The press release issued in connection with the signing of the AIP boldly assured that the Co-operative Regulator would "better protect investors, enhance Canada's financial services sector, support efficient capital markets and manage systemic risk … it will contribute to a stronger economy, improve investor protection and better respond to increasingly competitive, dynamic and global capital markets."[15] What it did not say was that the achievement of these lofty goals would require unprecedented federal-provincial co-operation and that these outcomes could be significantly compromised if the Co-operative Regulator was not able to attract virtually unanimous provincial and territorial support. Similar to the approach previously employed by the federal government when it released the *Canadian Securities Act*, broad provincial participation was implicitly assumed and no qualifications or contingencies were elaborated

15 News release, September 19, 2013.

for any other outcome. The AIP signatories simply chose to ignore the very real possibility that major provinces, such as Quebec and Alberta, would choose not to participate in the Co-operative Regulator.

It took an additional nine months of negotiations and significant financial inducements from the federal government, but on July 9, 2014, the original AIP signatories were able to announce that two additional provinces, Saskatchewan and New Brunswick, had agreed to join the initiative.[16] The recruitment of these two provinces was characterized by some observers as the "tipping point" that provided the initiative with the critical mass necessary to justify moving forward with implementation.[17] Three months later, on September 8, 2014, this characterization was borne out when the five participating jurisdictions signed a Memorandum of Agreement (MOA).[18] The signing of the MOA marked the point when the five formally committed to launching the Co-operative Regulator, notwithstanding limited provincial support.

The only apparent justification for making this commitment in the face of significant provincial opposition was that, with the addition of Saskatchewan and New Brunswick, the participating provinces now accounted for approximately 53 per cent of Canadian public market capitalization.[19] Citing this random statistic seemed to suggest that market capitalization was in some fashion a de facto proxy for popular support; and, with the participating jurisdictions now accounting for more than 50 percent of market capitalization, majority support had been achieved to impose a new securities regulatory model on Canada.[20]

There are at least two obvious flaws with this strained logic. For one thing, to the extent that market capitalization is even relevant in this context, it addresses only one dimension of securities regulation: public market issuers. This measure does not reflect the many other stakeholders in securities regulation, including investors, private market issuers, investment funds and registrants. Second, the MOA sets out several decisionmaking voting rules that would apply

16 A CBC news report posted July 9, 2014, indicated that "to secure their participation, Ottawa promised Saskatchewan and New Brunswick some concessions, including a cash payment equivalent to the five years of net revenues the provinces would have brought in had they continued operating their own regulators."

17 *Toronto Star* article dated July 10, 2014; IIAC commentary dated July 9, 2014; *Globe and Mail* article dated July 9, 2014.

18 The terms of the MOA were virtually identical to those in the AIP save for the new provisions necessary to attract the participation of Saskatchewan and New Brunswick, including: two additional regional deputy chief regulators in addition to the deputy chief regulators based in each of British Columbia and Ontario; the deputy chief regulators representing capital markets jurisdictions in western and eastern Canada will be initially located in Saskatchewan and New Brunswick; the nominating committees for the expert board of directors and independent adjudicative tribunal will include representation from all participating jurisdictions; fundamental changes to the Co-operative Regulator will require unanimous approval of the Council of Ministers during the initial three years after launch; the Co-operative Regulator will consider requests to accommodate provincial economic development initiatives where they do not adversely affect the fundamental principles of the Co-operative Regulator or affect market participants in other jurisdictions.

19 A July 10, 2014, article in the *Toronto Star* included the following: "The four provinces now onside represent about 53 percent of market capitalization for publicly listed Canadian companies, and roughly 75 percent of companies actually listed on stock exchanges."

20 Ibid. "That's a solid base on which to build. Supporters of the new system, which include the Canadian Council of Chief Executives and the Canadian Bankers Association, hail it as a tipping point in pulling together our balkanized clutch of 13 independent provincial and territorial regulators." *Toronto Star*, July 10, 2014.

once the Co-operative Regulator launches. In every instance, in order for a decision to be made, the MOA stipulates that support from at least 50 percent of the jurisdictions eligible to vote must be achieved. Consequently, when the participating jurisdictions made a unilateral commitment to launch the Co-operative Regulator with the support of only five of the 14 potential jurisdictions, their tally ignored a basic voting principle they themselves committed to in the MOA.

In addition to disregarding that most provinces and territories had opted not to join, the participating jurisdictions made their commitment to proceed at a time when the Co-operative Regulator was a work in progress, with many important issues not yet resolved. (Many of these issues still remain outstanding.) Furthermore, no indication was provided that the proposed new hybrid regulator had been subjected to a third-party evaluation or a comprehensive cost-benefit analysis before the commitment to launch was made. It appears that the participating jurisdictions unilaterally decided to commit Canada to a new and untested hybrid regulator even though its necessarily-unique governance and accountability infrastructure had yet to be fully articulated and the specific nature of the critical working relationship with non-participating provincial regulators had not been agreed. Absent these important elements, the decision to commit to a new regulator was, if not inappropriate, at least premature.

Section IV – Why the Rush?

Why commit to launch a still incomplete Co-operative Regulator without first exposing the proposed model to an independent assessment or third-party cost-benefit analysis? One possible explanation is an expectation on the part of the participating jurisdictions that additional provinces and territories would be motivated to join the Co-operative Regulator once it became operational. This "build it and they will come approach," if correct, would constitute a very risky tactic with limited upside. While some provinces or territories may be more inclined to join post-launch, it is unlikely that Quebec or Alberta would be among them. Both these provinces passed up the opportunity to join the project at a time when they would have been in a position to influence the structure and legislation of the new regulator, and both have remained steadfast in their opposition since. Furthermore, absent the imposition of penalties or sanctions on non-participating jurisdictions, a prospect that has to date not been raised, there is no basis to believe that either province will be more motivated to join the Co-operative Regulator once it launches. By remaining outside it, Quebec and Alberta will be in a situation that, in some respects, is analogous to that of Ontario relative to the passport system. Over the past 10 years, Ontario has been both able and apparently content to work cooperatively with the passport system but to remain outside it in order to retain its regulatory prerogative and autonomy. It is not difficult to see Quebec and Alberta adopting a very similar cooperative but autonomous relationship with respect to the Co-operative Regulator.

The inherent difficulties involved in evaluating the merits and efficacy of a regulatory system may offer another explanation for the reluctance of the participating jurisdictions to conduct a comprehensive analysis of the Co-operative Regulator. These difficulties can be attributed to the fact that most securities regulatory deliverables and outcomes (such as efficiency, accountability, competitiveness, enforcement and investor protection) defy obvious or absolute quantification. Consequently, most of the analyses and evaluations of securities regulatory models in Canada have been qualitative comparisons based on the experience of other countries and/or the assessments of international organizations, such as the Organisation for Economic Co-operation and Development and the International Monetary Fund.

Historically, advocates for a national regulator for Canada regularly cited the examples of the United States and Australia since both are federations like Canada and they both have a national securities regulator. However, since the global financial crisis, these examples are cited less often. America's travails in the global financial crisis have been well documented, and while Australia's banking sector fared relatively well, the country experienced significant failures of listed financial/investment companies and large investor losses from structured products and investment funds.[21] Britain was another international example that was often cited as a model for Canada to learn from, particularly during the expert panel's deliberations. Ironically, Britain's experience in the global financial crisis was also worse than Canada's. Bottom line: The international jurisdictions whose regulatory models have most often been cited as models for Canada no longer provide compelling evidence to justify overhauling Canada's existing regulatory framework, let alone rushing to replace it with a new and untested model.

International organizations, such as the OECD and the IMF, have also featured prominently in Canada's securities regulatory debate. Over the years, these organizations have offered their views on Canada's securities regulatory system in their country reports. Both organizations have consistently acknowledged that Canada's prevailing securities regulatory model operates well, but invariably recommend that Canada adopt a single national regulator model. The frequency and consistency of this recommendation coming from both the OECD and the IMF invests them with a presumption of wisdom that they may not necessarily deserve. For one thing, neither the OECD nor the IMF has performed specific empirical evaluations of Canada's securities regulatory environment to justify their recommendations for a single national regulator. In fact, the only empirical analyses that either organization does prepare with respect to securities regulation are their survey-based international rankings, where Canada's prevailing regulatory system consistently ranks at or near the top. It is a stretch, therefore, to suggest that the recommendations of international organizations justify an immediate overhaul of Canada's securities regulatory model, particularly when the proposed replacement is a hybrid regulator and not the single national regulator that they have persistently recommended.

A comparative analysis to establish the ostensible superiority of the Co-operative Regulator relative to Canada's existing regulatory model does not appear to have been performed and has certainly not been reported. As noted, the expert panel's final report and recommendations, which initiated the current regulatory reform process, were prepared soon after the introduction of the passport system. Consequently, the expert panel's single regulator recommendation was developed at a time when the passport system was still in its formative stages. An accelerated process of harmonization and closer integration among provincial regulators was only just beginning.

Since that time, working primarily through the CSA, the provincial regulators have achieved considerable progress in standardizing many aspects of securities regulation. More recently, notoriously unharmonized regulatory areas (including prospectus-exempt financing, takeover tactics and over-the-counter derivatives) have been codified, or are in the process of being codified, in highly harmonized national rules. Consequently, unlike the situation that existed when the expert panel prepared its report almost 10 years ago, Canada's current securities regulatory model, co-ordinated by the CSA, operates with a reasonably high level of co-ordination and collaboration among provinces

21 Brown and Davis (2010).

and territories.[22] Also, despite the persistent assertion that Canada's multi-jurisdictional securities regulatory model is handicapping the country's economic competitiveness and jeopardizing its financial integrity, the evidence to substantiate this claim, to the extent it is available, is almost entirely anecdotal.

Section V – The Heretofore Missing Analysis

Notwithstanding its unique and untested structure, its many important operating protocols that have yet to be articulated and its rejection to date by a majority of provinces and territories, most industry groups and academics continue to assert that the Co-operative Regulator will be an improvement relative to Canada's existing securities regulatory model. This section critically assesses the likelihood of this anticipated improvement. Where possible, quantitative evidence is used; however, in many cases, only qualitative information is available. In those instances, the yardsticks applied to draw conclusions include best practices, international norms and logic.

As context for this assessment, two key considerations deserve highlighting. First, as currently constituted, the Co-operative Regulator will impose a multi-lateral hybrid regulatory model on Canada, comprised of the Co-operative Regulator, exercising full provincial authority within the participating jurisdictions and limited national authority; and the provincial and territorial securities regulators that will continue to operate, much as they do today, within all the non-participating jurisdictions. Unlike the current passport model, which bears a clear resemblance to the securities regulatory model in place in the European Union, the Co-operative Regulator, in its current proposed form, is unlike any securities regulator in developed countries with mature capital markets. Furthermore, no analysis, domestic or international, has ever examined the efficacy, or recommended the adoption, of a Co-operative Regulator-type hybrid model. A meaningful assessment of the potential merits of the Co-operative Regulator is further complicated by the fact that, even at this relatively late stage in its development, the participating jurisdictions have not yet articulated the nature of the relationship that they intend to establish and maintain between the Co-operative Regulator and the other provincial securities regulators. Given the high level of co-operation that currently characterizes securities regulation in Canada, the Co-operative Regulator will be hard pressed to sustain, let alone improve, the existing situation.

Second, it is reasonable to suggest that developments in the nearly four years since the MOA was signed provide at least some preliminary insights into the interplay among the jurisdictions initially participating in the Co-operative Regulator. For an entity promised to be more efficient, innovative, responsive and flexible, the process of establishing the new regulator has been anything but, and the target launch date has already slipped from July 1, 2015, to the end of 2018. During this period, despite ongoing solicitations and inducements to attract additional participants, only Prince Edward Island and Yukon have agreed to join the Co-operative Regulator. Alberta, despite a change in government, has remained a steadfast non-participant and Quebec has successfully challenged the constitutional legitimacy of the Co-operative Regulator in the Quebec Court of Appeal. In terms of work product, the participating jurisdictions have prepared two consultation drafts of each of the provincial and federal legislation

22 Ontario is not part of the passport system, but an effective interface has been put in place to facilitate securities regulation between Ontario and the other provinces and territories.

that will be administered by the Co-operative Regulator; they have circulated an initial draft of most of the regulations that would apply within the participating jurisdictions; and they have appointed an initial board of directors and the first Chief Regulator. While these are not insignificant accomplishments, they have taken almost four years, with much work remaining to be done and many decisions still outstanding. The pace of production of the deliverables associated with this project should give pause considering the challenges that the participating jurisdictions will encounter post-launch in trying to work together to make the Co-operative Regulator more efficient and more effective.

With this context, the balance of this section evaluates the likelihood that the Co-operative Regulator will achieve its key purposes as set out in the most current version of the MOA (September 2016).

Global Competitiveness

The MOA asserts that the Co-operative Regulator would make Canada more globally competitive, which in turn would promote greater investment from abroad. This reasoning presupposes a strong nexus between Canada's securities regulatory model and the inflow of foreign investment into the country. In fact, securities regulation plays a relatively small role among the macro considerations that affect foreign investment flows. For one thing, securities regulation has no impact on foreign direct investment (in plant and equipment), which, to the extent it is regulated, falls under the federal *Foreign Investment Act*. In terms of foreign portfolio investments (stocks and bonds), securities regulation has some impact, but it is generally swamped by those macroeconomic factors that affect the relative rates of return on investments across borders, including trade agreements, investment opportunities, tax changes and exchange-rate fluctuations.[23] Also, the suggestion that Canada's existing regulatory framework is impeding foreign portfolio investment is not supported by the available data. Between 2010 and 2015, there was a 50-percent-plus increase in foreign portfolio investment in Canada (from $940 billion to $1.44 trillion).[24] Finally, it bears noting that Alberta, the province with arguably the largest appetite for foreign investment to support its energy sector, is one of the provinces that has consistently refused to join the Co-operative Regulator.

Modern, Innovative, Responsive and Flexible Regulation

The prospect that the Co-operative Regulator will produce modern, innovative, responsive and flexible regulation seems at odds with the actual draft legislation and regulations that have been published. The participating jurisdictions acknowledged in the MOA that they would work to ensure that the Co-operative Regulator would be able to work with the non-participating provinces to effectively create a system of "national application."[25] This self-imposed imperative highlights the limitations of the Co-operative Regulator not being a single national regulator. Due to many jurisdictions, including Quebec and Alberta, opting not to participate together with a stated desire to ensure national application, the participating jurisdictions effectively constrained the latitude available to them for legislative or regulatory streamlining and innovation. For the Co-operative Regulator, when launched, to integrate smoothly and operate as seamlessly possible with regulators in non-

23 Gallantly and Macdonald (2012).
24 Statistics Canada.
25 MOA, September 23, 2016.

participating jurisdictions, the new legislation and regulations would need to align closely with those of non-participating jurisdictions, leaving little scope to streamline, modernize or even improve existing legislation and regulations.[26] Going forward, handcuffed by this baked-in constraint, it will be difficult, if not impossible, for the Co-operative Regulator to respond quickly and flexibly to changing market conditions without the concurrence and support of regulators from the non-participating jurisdictions. As a result, the response time and adaptability of the Co-operative Regulator will not be in its own control and, ironically, will instead be dictated by the receptivity and reaction time of the non-participating jurisdictions.

The Co-operative Regulator model may also inhibit the inherent responsiveness and competitiveness of the current provincial system. The existing multi-jurisdictional model benefits from the distinct expertise enjoyed by regulators in different jurisdictions, reflecting in most instances the demographic of their market participants. British Columbia, for example, is a hub for small and early-stage issuers, particularly in the resource sector; while Ontario is home to a large and vibrant financial-services sector.[27] The expertise of these provinces' respective securities commissions has allowed them to pioneer many bespoke regulatory innovations. For example, British Columbia has regularly initiated programs to assist small- and medium-sized enterprises in their efforts to raise capital, and the Ontario Securities Commission recently launched a program to provide regulatory assistance and relief to emerging financial technology businesses.[28]

This unfettered capacity of individual provincial regulators to develop rapid and targeted regulatory responses to changing circumstances in their local securities markets will no longer be available to jurisdictions participating in the Co-operative Regulator. Virtually every regulatory change or innovation must apply across all participating jurisdictions and will go forward only after gaining support from the regionally decentralized Co-operative Regulator management team, securing approval from the board of directors and getting endorsed by the Council of Ministers. Ignoring the time and effort that will ultimately be necessary to harmonize a new initiative with non-participating jurisdictions, the sheer logistics of the Co-operative Regulator's decisionmaking/approval process may frustrate innovation and slow responsiveness even in the absence of significant policy differences among the participating jurisdictions.[29]

Finally, the introduction of an independent board of directors into the regulatory decisionmaking process may, at least initially, limit innovation and slow responsiveness. The board members, for all their knowledge and experience, will be operating at arm's length from the markets and the public. Lacking real-time hands-on market involvement, the board will be challenged to identify, let alone anticipate, where and when new or different regulatory responses are required or appropriate. Also, as an appointed board, the members will have

26 As set out in the Memorandum of Agreement, the CMRA will use its best efforts to negotiate and implement an interface mechanism with non-participating jurisdictions such that the CCMR is effectively of national application.

27 *Toronto Star*, June 20, 2016.

28 In October, 2016, the OSC announced the formation of OSC LaunchPad, the first dedicated team of a securities regulator in Canada to help fintech businesses navigate securities law requirements and accelerate time to market.

29 There is a somewhat complex voting mechanism built into the structure of the Co-operative Regulator that would allow the Council of Ministers to make decisions in situations where unanimous support cannot be achieved. However, this mechanism remains untested and it is unclear how quickly, if at all, the council would be prepared to resort to it.

limited contact with and no direct accountability to the public. Unlike the current system, where a provincial minister responsible for securities matters can be and often is held directly accountable for the actions of the provincial securities regulator, accountability for the Co-operative Regulator will be diffused through a Council of Ministers and a board of directors, that may prove less responsive as a result. Based on these considerations, the assertion that the Co-operative Regulator model will be more conducive to innovation and more responsive than Canada's existing securities regulatory model seems overly ambitious.

Investor Protection

The confident assertions in the MOA that the Co-operative Regulator will promote better investor protection and enhanced enforcement are particularly difficult to substantiate. It is true that the Co-operative Regulator initiative did represent an auspicious opportunity to strengthen investor protection and improve enforcement, but based on the proposed legislation and regulations and some of the adverse commentary it has already generated,[30] it now appears to be an opportunity lost. In its final report and recommendations, the expert panel provided a blueprint for a comprehensive set of progressive investor protection provisions.[31] Yet, despite the assurances in the MOA, not one of these recommendations was carried forward in the draft legislation for the Co-operative Regulator. From an Ontario perspective, the Co-operative Regulator, as currently configured, will actually constitute a step backward in investor protection infrastructure. The proposed structure of the Co-Operative Regulator includes neither an Office of the Investor or an Investor Advisory Panel two relatively recent constructs adopted by the OSC to provide a higher profile and more formalized forum to attract and process retail investor feedback on policy issues. In the August 25, 2015, backgrounder on the revised consultation draft of the provincial-territorial *Capital Markets Act* and draft initial regulations, the participating jurisdictions specifically addressed the omission of a statutory Investor Advisory Panel in the CMRA governance structure. They indicated that they would solicit advice from the CMRA board on this matter once the board was established. The initial board of the CMRA was announced over one year ago and to date there has been no indication that the board has even been engaged on this important investor protection issue. The reluctance of the participating jurisdictions to push the envelope, even modestly, by incorporating new provisions in the proposed legislation and regulations to strengthen investor protection does not lend credence to the assurances that the Co-operative Regulator will promote better investor protection.

The ability of the Co-Operative Regulator to become a champion of investor protection will require many of the participating jurisdictions to become much more engaged with this issue than they have in the past. Most of the investor protection initiatives undertaken in Canada in

30 "What About the Investors? White Paper on the Proposed Capital Markets Regulator," by Anita Anand May 1, 2017.

31 The expert panel final report released on January 12, 2009, recommended the establishment of a dedicated service to address the lack of information, guidance and support for investors in the domain of complaint-handling and redress; a securities regulator with the power to order compensation in the case of a violation of securities law so that the investor would not be required to resort to the courts; establishment of an investor compensation fund funded by industry to allow a securities regulator to directly compensate investors for a violation of securities law; mandatory participation of registrants in the dispute resolution process of a legislatively designated dispute resolution body; and establishment of an independent investor panel.

recent years have emanated primarily from two jurisdictions, Ontario and Quebec. This is to be expected since these two provinces are home to the country's largest concentration of investors.[32] It has often proved difficult for the regulators in these two provinces to convince other jurisdictions to support the implementation of investor protection regulations they had championed. In many of these instances, Ontario and Quebec, either independently or together, opted to act unilaterally to develop and introduce the provision exclusively within their borders.

This unilateral prerogative to introduce a provision, whether of an investor protection nature or otherwise, will no longer be available to any jurisdiction participating the Co-operative Regulator once it launches. Instead, it will be necessary to secure a consensus from the participating jurisdictions. This requirement may prove particularly challenging for investor protection provisions since they will require the support of jurisdictions that have historically not exhibited much enthusiasm for initiatives in this area. In addition, to date, neither the Chief Regulator nor the board of the Co-operative Regulator have made any explicit commitments or given any indication that investor protection will be among its early priorities.[33] Notwithstanding the repeated assurances that the Co-operative Regulator will enhance investor protection, the available evidence is not reassuring.

Enforcement

The MOA appropriates the most familiar, and arguably the most seductive, argument for a single national securities regulator by asserting that it will deliver more effective enforcement. The resonance of this assertion is a direct result of the perception held by many that Canada's enforcement of financial misbehaviour compares unfavourably with other jurisdictions. As an aside, because of the absence of an agreed metric to calibrate enforcement effectiveness, this perception of poor enforcement remains the subject of ongoing debate among policymakers and academics. Assuming for this purpose that perception is reality, it is unclear how the Co-operative Regulator, in its current form, will improve enforcement outcomes. Enforcement spans a wide range of actions from regulatory to criminal. Provincial securities regulators are primarily administrative enforcement agencies and are very limited in both the types of activities they can adjudicate and the types of sanctions they can impose. The federal government, for its part, bears the major responsibility for enforcing the Criminal Code provisions concerning securities fraud and the prosecution of serious offences. Based on past performance, including the ill-fated Integrated Market Enforcement Team, the federal government has not exhibited particular proficiency in conducting effective securities enforcement. Consequently, it is not obvious that simply importing the federal government and the relevant provisions of the Criminal Code into the

32 List of recent innovations: Examples of initiatives where this unilateral approach was adopted include whistleblowing, no-fault settlements, an investor compensation fund, secondary market liability and derivative regulation.

33 In an interview published by Get Smarter About Money on its website on November 17, 2016, Bill Black, chair of the CMRA, is quoted as saying: "The single most important goal right now is that on launch day, everything works well. We will have some hiccups during those first six to 12 months, but after the initial period, I want people to say, 'It's working and it's better than we expected, and here are three or four reasons why."

Co-operative Regulator will on their own improve securities enforcement in Canada. In fact, there is the possibility that conflating federal criminal enforcement with compliance and administrative enforcement "would make decision-making remote from both victims and suspects, adding significant delays and higher costs."[34]

The MOA's promise of enhanced enforcement fails to explain how this outcome will be achieved in a model that does not include the participation of many jurisdictions, including Quebec and Alberta. The absence of many provinces and territories is especially problematic, since many observers identify a lack of consistency in regulatory decisionmaking across all jurisdictions as a serious handicap for effective enforcement. Since securities regulation in Canada will continue to feature multiple regulators, even after the launch of the Co-operative Regulator, logic suggests that regional differences and inconsistencies in enforcement will persist. While greater consistency would enhance enforcement, a concerted effort to improve communication and co-ordination among provincial regulators would probably be at least as impactful as and less disruptive than introducing a new federal/provincial regulator into the mix.

Finally, no evidence is offered to support the implicit assurance that by reducing the number of securities regulators from 14 to 8, enforcement of securities offences will improve in Canada. Securities regulators are only one component of a multi-party, multi-layered enforcement ecosystem that has been described as a "mosaic."[35] Other key players in this mosaic include the two major Canadian self-regulatory organizations (SROs) – the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association (MFDA) – that enforce their own rules; the independent dispute-resolution service for investment complaints, the Ombudsman for Banking Services and Investments (OBSI); the national and local police; the provincial courts and federal crown counsels. Effective enforcement can only be achieved when all the components of this mosaic are working well together.

The Co-operative Regulator, in its current form, does not provide for or contemplate any structural changes to the existing enforcement mosaic. While a truly national regulator would enjoy both the mandate and authority to make meaningful structural change across this national mosaic, the Co-operative Regulator will not enjoy this prerogative. Constrained by the absence of many provincial and territorial jurisdictions, the participating jurisdictions did not pursue much-needed SRO reform; they did not provide the OBSI with the authority to enforce its decisions; and they did not introduce a nationally co-ordinated securities enforcement team including regulators, police, provincial courts and crown counsels. Unable or unwilling to make these important structural changes, assurances that the Co-Operative Regulator will improve enforcement ring hollow.

Systemic Risk

The participating jurisdictions, responding to the post-financial crisis appetite for enhanced systemic risk regulation, assured Canadians that the Co-operative Regulator would "strengthen Canada's capacity to identify and manage systemic risk on a national basis." There can be no doubt that the crisis experience did highlight the need to improve the monitoring and management of systemic risk in many countries, including Canada. However, in Canada's case, this improvement could have been

34 "Reforming Canadian Securities Regulation: Risks and Opportunities." Speech by Douglas M. Hyndman, chair, British Columbia Securities Commission. the Fraser Institute. February 23, 2009.

35 Term most often cited by David Wilson when he was chair of OSC – see April 16, 2008, article below.

achieved more easily and effectively by introducing a new stand-alone systemic risk regulator than by overhauling the existing securities regulatory framework. The current initiative that embeds the national systemic risk regulator in an essentially provincial securities regulator is unnecessarily cumbersome, has introduced potential blind spots[36] (in non-participating jurisdictions) and is clearly out of step with prevailing international practice. All major jurisdictions that have recently established or reorganized their systemic-risk regulatory bodies, including the United States, Britain and the European Union, have created standalone entities or adjuncts to their banking regulators. Structurally, this comprehensive and financially over-arching approach aligns more closely with the cross-product nature of systemic risk and the fact that, historically, systemic risk has either originated or metastasized most quickly in a country's banking system. The proposed approach to administer systemic-risk legislation within the Co-operative Regulator rather than by establishing a dedicated regulator or one affiliated with the Bank of Canada, does not conform with international best practice and could compromise Canada's ability to monitor and mitigate systemic risk effectively.

Beyond proposing an internationally atypical systemic risk regulator, the decision to embed Canada's national systemic-risk regulator within a sub-national securities regulator has stoked ongoing constitutional criticism of the Co-operative Regulator project. The Supreme Court, in its reference decision, did acknowledge a role for the federal government in systemic risk regulation and at the same time did leave open the door for a co-operative arrangement between the federal government and the provinces. However, the Supreme Court did not specifically affirm the constitutionality of incorporating a systemic-risk regulator with national application within a securities regulator that has only secured the co-operation of a minority of provinces and territories. Had the federal government, following the Supreme Court decision, established a stand-alone federal systemic risk regulator rather than embarking on a wholesale securities regulatory reform initiative, it is likely that the systemic risk regulator would be up and running providing much needed surveillance absent any constitutional drama.

Section VI –Conclusion

Securities regulation reform in Canada provides scope for all interested observers and participants to have their own opinion, but established facts are not equally mutable. In the current debate, one such fact is that in its current form, the CMRA is not and will not be Canada's long-sought-after single national regulator. The CMRA is a compromised Plan B alternative that will lack the ability to unilaterally impose its regulatory authority across the country, a fundamental feature of a single national regulator. Furthermore, there is no evidence that key jurisdictions like Quebec and Alberta are likely to join the new regulator following its launch. In its current form it is not obvious that the CMRA will constitute an improvement relative to Canada's existing securities regulatory system. Canada's provincial securities regulators have, in recent years, collaborated more effectively to create a relatively high degree of harmonization in Canadian securities regulation, which in turn has fostered vibrant and resilient capital-market growth in Canada. While differences remain, particularly with regard to investor protection initiatives, it would be unfortunate if the introduction of the CMRA upsets this regulatory equilibrium and jeopardizes the positive outcomes and greater cooperation that have been achieved.

36 For example, integrated regulators like Quebec's AMF share systemic responsibilities with regard to Desjardins Group and it will not be at the cooperative or federal table.

It is also disconcerting that, with the CMRA's target launch date a little more than a year away, important information remains outstanding and some of the information that has been made available raises as many questions and concerns as it addresses.[37] For example, the nature of the interface between the CMRA and the non-participating provinces has not been described, the fee schedule for the new regulator has not been released and the Board has yet to articulate its regulatory vision; also, the decision making and governance structure of the new regulator set out in the MOA requires additional detail, definition and description.

An ongoing concern is that other than the initial assurances set out in the MOA, the jurisdictions participating in the CMRA, have made no effort and offered no evidence to justify replacing Canada's existing securities regulatory structure with the CMRA in its current form. Absent this evidence, it is impossible to dismiss the possibility that the launch of the CMRA will create significant risk and disruption in Canada's securities markets without delivering better regulation and stronger enforcement. Just the prospect of the introduction of a new regulatory model has created concern, uncertainty and contention among participants in Canada's capital markets.[38] If launched, the new regulator will result in a fundamental reworking of the architecture and accountability of securities regulation in Canada with significant policy ramifications and potential economic implications. With this much at stake, it is important that the participating jurisdictions provide credible information about what exactly the Canadian public will be getting and what exactly they will be sacrificing if the new regulator launches as planned.

To do this in a meaningful way, the participating jurisdictions need to put the brakes on the current initiative pending an independent review and cost-benefit analysis of the CMRA, as currently constituted. Considering the significant impact that securities regulation has on the saving, investing and financing activities of almost every Canadian, this type of review and analysis is both necessary and appropriate. It is important that the Canadian public impress on the participating jurisdictions the obligation they have to undertake this type of comprehensive assessment. Canada's current securities regulatory framework is not perfect and it is generally acknowledged that a single national regulator would be preferable. However, the CMRA is not a single national regulator and its launch will not immediately create a regulatory framework that is unambiguously superior to the one now in place. Consequently, the CMRA does not deserve nor warrant a review-free launch. Slowing down the process and taking the time necessary to perform a fulsome review of the proposed new regulator seems reasonable given the implications of a premature launch of a potentially flawed regulator. The CMRA may not be ready for prime time and it will be far better to make this determination before rather than after it launches.

37 The information now available about the proposed Co-operative Regulator include: A memorandum of agreement among the participating jurisdictions; two consultation drafts of the federal and provincial legislation that the new regulator will administer; a draft of the initial regulations; and the identities of the initial board members and chief regulator.

38 Commenters, both pro and con, on the initial consultation draft of the CMA highlighted concerns, including the absence of information on the interface between the Co-operative Regulator and regulators in the non-participating provinces and particularly an assurance that the interface would be as seamless as possible; the wording differences between the proposed new legislation and legacy legislation; need for a transition period to allow market participants time to familiarize themselves with the new rules; the constitutionality of the new proposed legislation; integration with other financial sector regulators; and inadequate consultation.

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