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Capital Markets Modernization Taskforce

Dear Sirs/Mesdames:

Re: Consultation – Modernizing Ontario's Capital Markets

This letter is provided to you in response to the July 2020 Consultation Report (the "**Consultation Report**") of the Capital Markets Modernization Taskforce (the "**Taskforce**"). Following our initial comments, we will respond to the specific questions asked regarding the proposals as set out in the Consultation Report. We appreciate the opportunity to provide this comment letter and hope that our submissions will be of assistance.

We are highly supportive of the Government of Ontario's efforts to review and modernize Ontario's capital markets and strongly support the Taskforce's efforts to propose substantive changes to the regulatory landscape in Ontario in a manner that will achieve that goal. It is clear that Ontario must strive to be a world-class capital market and, as such, Ontario should approach capital markets regulation in a manner that facilitates capital formation, permits an ample variety of investment opportunities, adequately protects investors and is consistent with other global capital markets. Ontario companies should have easy access to capital within the province, and Ontario investors should be able to support those companies, and in turn the provincial economy, safely without facing greater barriers to investment than those in other jurisdictions. We strongly agree that capital formation and investment within Ontario should not be impeded by an outdated or overly burdensome regulatory environment. In that regard, we also continue to encourage and support the Ontario Securities Commission's ("**OSC**") Regulatory Burden Reduction project and would encourage the Taskforce to focus on removing or reducing regulatory burdens, rather than adding to, or simply shifting, regulatory obligations.

The United States has recognized the importance of facilitating capital formation in order to maintain the strength of its capital markets and support the growth of its economy. The Jumpstart Our Business Startups Act (the "**JOBS Act**") introduced significant reforms to U.S. capital markets regulation and has significantly fostered and encouraged capital raising in the United States. The focus on reducing the regulatory burden on issuers and other stakeholders has greatly improved the U.S. capital markets.

Unfortunately, Ontario has been slow to follow suit. Comparatively, Ontario has become, in many ways, a more onerous and challenging capital market for capital formation than the United States. By way of example, prior to the JOBS Act coming into effect, cross-border initial public offerings generally encountered a more resistant and challenging

clearance process in the United States than in Canada – market participants expected a significantly greater number of comments on the U.S. registration statement to be issued by the United States Securities and Exchange Commission ("**SEC**") than the number of comments issued by the OSC, and that it would take a correspondingly longer time to clear the SEC's comments. The more welcoming regulatory approach in Ontario created an incentive for Canadian companies, and even foreign companies, to complete their initial public offerings in Canada and list their securities on Canadian stock exchanges, rather than incur the lengthier, more onerous and more expensive process of a U.S. IPO.

Since the implementation of the JOBS Act and other corresponding changes in the US securities regulatory landscape, we have been disappointed to see Canadian companies that could have been strong contributors to the vibrancy of the Ontario capital markets elect to pursue their initial public offering and listing only in the United States, largely because of the complexity of Ontario regulatory impediments that are outdated, now more onerous than the corresponding U.S. requirements and that serve a questionable investor protection benefit. We think it is time to adopt reforms aimed at bringing Ontario securities regulatory requirements in line with the modernizations that have been taking place in the United States, and also to adopt a regulatory mindset focused on the importance to Ontario's economy of attracting issuers and investments to the province. Amendments to laws and regulations alone cannot be the sole drivers of modernization - there must also be changes in the implementation and interpretation of these laws, regulations and the policies underlying them by Staff of the OSC in order to enhance competitiveness within Ontario. One example (among many) are the more onerous financial statement requirements in Ontario for acquired businesses and the issuer's "primary business", compared with how those requirements are interpreted and applied in other provinces of Canada and with the modernized rules in the United States. They often result in a requirement to include financial statements in an Ontario prospectus that do not contain relevant information for investors and that would not be required in other provinces of Canada or in the United States, solely to satisfy the OSC's interpretation of existing technical requirements. Regulatory reform towards modernization in the United States fostered a newly invigorated approach to capital markets regulation that was focused on the importance to the economy of making it easier to raise capital, without unnecessary "speed bumps" in the process resulting from overly rigid rules and dogmatic technical considerations. We encourage the Taskforce to think broadly about ways to achieve similar success through reforms in Ontario

The JOBS Act fostered a newly invigorated approach to capital markets regulation in the United States that was focused on the importance to the economy of making it easier to raise capital, without unnecessary "speed bumps" in the process resulting from overly rigid rules and dogmatic technical considerations. We would encourage the Taskforce to think broadly about ways to achieve similar success through reforms in Ontario.

We believe that the Consultation Report provides a number of policy initiatives that will benefit the Ontario capital markets. At the same time, we note that certain of the proposed recommendations present changes that enhance the regulatory burden on certain capital markets participants in a manner that would appear to outweigh any actual or perceived benefits to investors or the integrity of the market. We do not believe that the call to "level the playing field" is necessarily in the best interests of investors, issuers or even the smaller market participants who might believe they have the most to gain, without appreciating that they, too, will suffer if the result is to weaken the strength, reputation and global competitiveness of Ontario's capital markets. Any new regulation to the benefit of one particular group must be carefully measured in terms of its overall detriment to other capital markets participants and to the attractiveness of Ontario as a market.

We appreciate that many jurisdictions around the world have different approaches to the regulation of capital markets that may present interesting ideas for regulatory policy for the Ontario capital markets. However, there can be no doubt that Ontario's capital markets compete most directly with those in the U.S., the closest market to ours both physically and culturally. Given the importance of U.S. investors to capital formation by Ontario issuers, and the importance of U.S. investment opportunities to Canadian investors, we believe that alignment with U.S. regulatory requirements and practices and efforts to create a more, rather than less, favourable regulatory environment are some of the most important ways to strengthen Ontario's capital markets. We strongly encourage the Taskforce not to create or expand impediments to companies raising capital in Ontario, or to investing in Ontario, through regulatory changes that would widen the gap between Ontario and the United States, or other capital markets globally.

We support effective, timely, consistent and meaningful enforcement efforts by the OSC and other regulators to fulfill their statutory mandates. As reiterated by the OSC and a number of courts, including the Supreme Court of Canada, regulators' enforcement efforts should be prospective and directed to protect investors, the integrity of the capital markets and confidence in the fairness, safety and efficiency of our capital markets. Courts have been clear that the role of regulatory enforcement is not to punish; penal consequences reside in the realm of criminal or quasi-criminal law and processes, not in the regulatory realm.

We support many of the balanced enforcement recommendations in the Consultation Report, as described below. We offer specific suggestions on how the proposed changes could be implemented. We believe the proposals and our suggestions are consistent with the core principles of enhancing the fairness, transparency and efficacy of the enforcement regime. Based on these principles, we disagree with many of the published and reported comments of the Canadian Securities Administrator ("**CSA**") regarding the enforcement proposals in the Consultation Report. While we acknowledge that the proposals may give rise to different procedural approaches in Ontario than some CSA jurisdictions, there

already exist unique enforcement processes and procedures across the CSA jurisdictions. To the extent the other CSA jurisdictions are concerned about substantive or process divergence, we invite and encourage the CSA to adopt these proposals to harmonize and modernize enforcement across the country.

There is widespread consensus that the enforcement system in Ontario must be modernized. Effective enforcement must be prompt, timely and efficient and matters need to be dealt with on a cost- and resource-effective basis. This must apply to investigations as well as the processing and disposition of matters that come before a commission or tribunal. In that regard, we support the sentiments and motivations underlying the Taskforce's recommendations. At the same time, an effective enforcement regime must be proportionate – in both process and outcomes sought, and seen to be so, like all other aspects of capital markets regulation.

Finally, while we recognize that the Taskforce's mandate is to make recommendations to the Ontario Government for potential changes to improve the Ontario capital markets, we strongly encourage the Taskforce to consider its recommendations more generally with a view to harmonization of capital markets regulation nationally, given the importance of Ontario's capital markets to Canada as a whole. Having a harmonized approach to regulation is critically important to the success of Canadian issuers and we are hesitant to recommend changes that will only impact regulation in Ontario without consideration of changes more broadly across the country following consultation with CSA partners.

To that end, we believe many of these recommendations raise significant policy considerations, and although certain changes can (and should) be made on an expedited basis, many of them require significantly more time for consideration and consultation to ensure that the Taskforce's recommendations are aligned with the consultation work and burden reduction initiatives already underway in Ontario and across the CSA.

We do not believe Ontario capital markets participants have had sufficient time to fully consider and address the Consultation Report and would encourage and welcome empirical study of the underlying drivers of many of the proposals, cost/benefit analyses of the proposals and further consultation with all Ontario capital markets participants. Given the sheer breadth of the issues discussed in the Consultation Report, we acknowledge that there will not always be clear consensus views on each of the proposals. However, these are important initiatives which merit proper consideration, and although we are supportive of accelerated change, adoption of many of the Taskforce's recommendations without due consideration and an appropriate public consultation may create more harm than benefit.

Set out below are specific comments to each of the Taskforce's recommendations.

Ontario Securities Commission (OSC) Governance

1. Expand the mandate of the OSC to include fostering capital formation and competition in the markets

We believe the OSC's current mandate, to protect investors, foster fair and efficient capital markets and confidence in those markets, and to contribute to the stability of Canada's financial system, as reflected in the statutory purposes of the Securities Act (the "**Act**"), is sufficiently broad and robust to address the concerns raised in the Consultation Report without the need for any statutory amendment.

We are supportive of clarifying that the OSC's mandate has always included, and must continue to include, fostering capital formation in Ontario. The twin objectives of securities regulation have always been investor protection and market efficiency. The OSC's mandate must include fostering capital formation, or else there will be no capital market, efficient or otherwise, for it to regulate. We agree that it is important for Ontario's securities regulatory authority to adopt a facilitative mindset to support the growth of Ontario's capital markets. At the same time, any such change must not change the OSC's role to an active market participant with a proactive role in picking "winners" and "losers". Moreover, "fostering capital formation" should be seen to be developing regulation and policy to generate capital formation, rather than an interference in market participant and investor choice.

We are not supportive of the proposal to include competition within the mandate of the OSC. The current mandate already directs the OSC to take steps that foster the fairness and efficiency of the capital markets. To ensure a rigorous, clear and consistent approach to competition law enforcement in Canada it is important that the core principles of Canadian competition policy, as well as the obligations imposed on Canadian marketplace participants, are contained, developed and enforced through the existing Competition Act framework.

A core principle of Canadian competition policy is that the appropriate regulatory objective is to protect competition, rather than individual or specific categories of competitors. While competition does produce winners and losers, competition benefits consumers and the economy by spurring price reductions, better quality products and services, greater choice and greater innovation. For this reason, Canadian competition policy balances the importance of incentivizing firms to innovate, invest and become more efficient by allowing them to benefit from the fruits of their efforts, with the circumstances in which market conduct undermines the competitive process and must be curtailed.

We do not believe there is need to duplicate or supplement the existing competition framework at the provincial level for the capital markets. While cooperation between

capital markets enforcement bodies and the Competition Bureau is essential, the basis for that cooperation is already reflected in the Memorandum of Understanding between the OSC and the Competition Bureau. Vesting a sector-specific regulator with a competition policy mandate would undermine the objective of having a principled competition law which is consistently enforced across the country.

In addition, we believe the proposal raises concerns about the possibility of overlapping, duplicative and potentially inconsistent regulation. We are not confident that the Ontario capital markets currently lack for competition, or that an increase in competition would necessarily improve Ontario's capital markets. Any such conclusion, and any statutory revisions intended to address it, ought to be reached based on empirical, rather than anecdotal evidence, and measured against a proper cost/benefit assessment with due consideration to the intended and potentially unintended consequences.

2. Separate regulatory and adjudicative functions at the OSC

We support the general recommendation to separate the Tribunal role of the OSC from its regulatory, rule-making functions, and offer specific suggestions of how it can be achieved most effectively. We also support the recommended governance initiatives, including separating the functions of the CEO and Board Chair within the OSC.

The separation of the regulatory and adjudicative functions raises important governance questions, including the role of the anticipated Board and its relationship to the Minister of Finance as well as OSC Staff. These crucial issues need to be well considered, and, like many of the issues raised by the proposals, require further thought.

Historically, the OSC's regulatory and adjudicative functions have been closely tied; adjudication by the OSC has been an important component of its policy making role. Disassociating the two would require major structural, organizational and cultural reform.

We suggest the Taskforce consider the following principles when recommending its vision for a revitalized governance and operating model for a modern capital markets regulator:

(a) the OSC should operate in accordance with the highest and best standards for a modern and responsive regulator, with a governance model that is reflective of best governance practices and accountability to investors, market participants and to the government it serves;

(b) both the regulatory functions and the adjudicative functions must pursue its statutory mandate and exercise its functions transparently, free from any perception of bias or undue interference from each other or by the government; and

(c) government oversight, accountability and policy direction is imperative; however, the regulator ought to be permitted to operate on an "arm's-length basis" from the government, through the powers granted to the CEO under the Act, and subject to oversight by the Board, which should have all the appropriate responsibilities and authorities granted to it by the Act and be subject to widely accepted principles of good governance.

While these, or similar principles, can be reflected in a bifurcated regulatory model consistent with the Taskforce recommendations, we do not agree with some of the specific aspects of the Taskforce's recommendations. In particular, we do not believe these principals are consistent with the recommendation that the "Tribunal report directly to the Minister of Finance" alone; as stated below, some Tribunal aspects should be subject to Ministry of the Attorney General oversight. Further, to allow the Board to operate as a governance-focused board of directors, we suggest that the compensation of the CEO should be set and determined by the Board pursuant to good governance principles and transparency. Key performance indicators should be set and evaluated by the Board but could be the subject of consultation with the Minister of Finance and in accordance with governmental protocols. The compensation of the Chief Adjudicator could be set by the Minister of Finance, with or without input from the Board, commensurate with the specialized expertise required.

Applying these principles, we suggest the following could be considered as a model, which is consistent with the model recently introduced for the Financial Services Regulatory Authority of Ontario ("**FSRA**"):

(a) The OSC could be reconstituted into a Capital Markets Regulation Authority (the "**CMRA**"), with a distinct regulatory division and adjudicative division, similar to that established for the FSRA under the Financial Services Regulatory Authority of Ontario Act, or the proposed Cooperative Capital Markets Authority corporate structure and governance model.

(b) An oversight and fiduciary board could be constituted and made responsible for rule making and overall strategic and directional oversight and appointing the Chief Executive Officer, being the most senior officer of the Regulatory Division.

(c) The Adjudicative Division, which would house and support the Tribunal, should be wholly separate and distinct from the Regulatory Division, with its own staff, subject to (e) below.

(d) The Adjudicative Division could be led by the Chief Adjudicator, a new position, distinct from the Board Chair and the CMRA CEO. The Chief

Adjudicator would be appointed by Order-in-Counsel on the recommendation of the Minister of Finance, for a renewable fixed term. The Chief Adjudicator would be the senior member of the Tribunal and be responsible for the administration of all aspects of the Tribunal operations, from staffing panels, to overseeing its administrative and financial needs.

(e) While the Chief Adjudicator would be appointed on a recommendation of the Minister of Finance, the role needs to be functionally independent of any governmental, Board or Regulatory Division interference. This notwithstanding, for operationally efficiency, administrative and funding support could be provided through the Regulatory Division subject to transparent operational agreements, to safeguard the appearance of adjudicative independence. In this regard, the Board could have some operational engagement through the Chief Adjudicator since allocation of financial resources could be addressed by the fee rule in a transparent way.

(f) To accommodate the administration and operational needs of the Adjudicative Division, there would be some accountability to the Minister of Finance. Other than that, and as set out above, the Tribunal itself should not report or otherwise engage with the Board or the Minister of Finance. Any additional oversight or support should be provided through the Ministry of the Attorney General.

(g) The Board, like the Board under the FSRA model and contemplated by the cooperative regulator initiative, should be responsible for oversight of the Regulatory Division. Among other things, the Board would be responsible for the Regulatory Division's strategic goals and direction, which would be the subject of public consultation and approval of the Minister of Finance annually.

(h) The CEO, through delegation to executive officers (or directors), would be responsible for the administrative delivery of the regulatory regime, as provided by securities law (consisting of securities legislation, rules and orders of the Tribunal). The CEO and the CEO's delegates would have specifically determined authorities to ensure the efficient, expedient, but fair administration of securities law.

(i) The Board, not the CEO, should be responsible for exercising rule making authority granted to the CMRA by the Act. The Act should be amended only to that extent, largely maintaining the current rule-making processes.

(j) Finally, the Board (not the Minister of Finance) should set the compensation of the CEO and terms of engagement and have the responsibility of

oversight of the retention or termination of the CEO in accordance with good corporate governance practices. The Minister of Finance could set parameters in accordance with the CMRA's memorandum of understanding and the Board could make such decisions subject to the Minister's approval.

While we recognize that there are many different models and approaches that could be pursued, the approach described above reflects principles of good governance and regulatory practice. It also enhances and supports the principles that animate a strong, effective and respected regulator, including decision-making that is arm's-length from the government, balanced with it being subject to political oversight by the Minister of Finance.

With respect to the proposal for a new Tribunal, while we are generally supportive of bifurcation, we note the importance of maintaining the unique expertise and flexibility associated with the current model. We would not want to lose that, particularly in respect of certain matters which require specialized expertise.

We are of the view that the Tribunal should address all adjudicative matters (rather than having any adjudicative role being reserved for the Board). However, we would not foreclose a role for some Board members being able to sit on certain matters as members of a Tribunal panel, depending on the subject matter underlying the hearing and subject to consideration of any perceived bias.

Current adjudicative activity can be delineated into three general types of matters:

(a) corporate transactions/merger and acquisition matters;

(b) reviews of exchange, SRO and delegated executive director/branch director decisions; and

(c) market conduct related enforcement matters.

In our view, appropriate Tribunal expertise can be maintained by thoughtfully staffing Tribunal hearing panels with individual adjudicators that have the necessary expertise and backgrounds. Part-time Tribunal adjudicators could be appointed and a list maintained reflecting a diversity of backgrounds, expertise and experience. As matters come to the Tribunal and require a hearing panel, the Chief Adjudicator could appoint a panel based on the nature of the matter. For certain corporate transaction matters, or SRO or exchange review, we see no reason why Directors could not be a member of a hearing panel (although we would advise against a majority of Directors being appointed to any panel). For true enforcement matters, or reviews of delegated executive director/branch director decisions, Directors should not sit on the panel (since enforcement Staff or those whose decisions are under review would be accountable to the Board through its oversight of the CEO).

Self-Regulatory Organizations (SROs)

3. Strengthen the SRO accountability framework through increased OSC oversight

The Taskforce's proposal raises questions about the nature and extent of self-regulation in Canada, and assumes that SROs need less independence, greater oversight and limits imposed on their regulatory activities and governance. We do not know if this assumption or conclusion is based on anecdotal or empirical evidence or the nature and substance of that evidence. Without commenting on the legitimacy of the concerns assumed, we submit that any reconsideration of SRO accountability and authority should be done in coordination with the CSA as a whole and not unilaterally by Ontario.

Canada is one of the few remaining markets that rely on self-regulation in its capital markets regulatory framework. In a system that is provincially oriented, SROs have played an important role in providing nationally-scoped regulation within their respective jurisdictional spaces. We agree that the entire Canadian SRO system, however, should be reassessed within a broader review which asks a number of questions, including:

- What do market participants and investors want, need and expect from their regulators?
- What role should self-regulation play, if any?

Needless to say, this is a complicated question, and one that needs to be considered beyond Ontario's perspective, given that the SRO system impacts all CSA jurisdictions. The relevant questions ought to be asked of SRO members, the investors they serve, regulators that have empowered them and governments. Like many issues raised in the Consultation Report, the proposal requires a greater deal of focus and consideration than allowed by the abbreviated period for comments on these proposals.

The CSA is currently engaged in a consultation process which touches upon the future of SROs in Canada. We urge the Taskforce to await the outcome of that process before making any recommendations in this area, which will otherwise appear premature and unilaterally Ontario centric.

4. Move to a single SRO that covers all advisory firms, including investment dealers, mutual fund dealers, portfolio managers, exempt market dealers and scholarship plan dealers

We agree with the concept of regulatory integration and the reduction or elimination of multiple regulators, particularly in light of the regulatory burden and confusion that a

diffused regulatory structure imposes on market participants and investors. Jurisdictional overlap and regulatory duplication is unnecessarily costly and diverts resources that could better be applied to promoting innovations and investor choice. However, for the reasons described above in our response to proposal 3, we urge the Taskforce to await the outcome of the CSA consultation process before making any recommendations in this area.

Supporting Ontario's Issuers and Intermediary Market

5. Mandate that securities issued by a reporting issuer using the accredited investor prospectus exemption should be subject to only a seasoning period

There are several proposals in the Consultation Report that express the common theme of making it easier for an existing reporting issuer to raise additional capital by way of additional securities offerings. Eliminating the private placement hold period for reporting issuers is not fundamentally that different in result from allowing reporting issuers to sell securities that are effectively prospectus qualified at any time by using their existing continuous disclosure record in lieu of a prospectus. Neither of those alternatives is fundamentally different from allowing certain issuers (such as those called well-known seasoned issuers, or WKSIs, in the United States) to file a shelf prospectus that becomes automatically effective without review. Further, none of these alternatives is that far removed from the existing shelf prospectus system, under which an issuer need only have the foresight to file a shelf prospectus in order to be able to sell freely-tradeable prospectus-qualified securities to anyone at any time.

We do not believe that eliminating the hold period for privately placed securities under the accredited investor ("**AI**") exemption (or other prospectus exemptions) should be a priority for reform, particularly compared with other proposals such as the adoption of a "well-known seasoned issuer", (or "**WKSI**"), model. Without a hold period, securities that are sold to accredited investors could immediately be resold to non-accredited investors, making the distinction between accredited and non-accredited investors somewhat meaningless from an investor protection perspective. Issuers who choose to take advantage of sales to accredited investors without a hold period may have no incentive to undertake prospectus qualified offerings, other than to access the broader (non-accredited investor) retail investor market. We believe this could prejudice retail investors, who may be excluded from participating in many securities offerings.

An alternative to the elimination of a hold period that would not exclude retail investor participation is the "issuer registration" model, in which an existing reporting issuer would be free to issue its securities to anyone at any time, using its existing continuous disclosure record in lieu of a prospectus. However, we do not think this is the appropriate model for Ontario either, because it would put Ontario out of step with the rest of Canada, the United States and other global capital markets. Proponents of "issuer registration" in the United

States have long advocated for this approach to be adopted under the U.S. Securities Act of 1933, as amended (the "**U.S. Securities Act**") and it has, to date, been considered a bridge too far. The shelf prospectus procedures initially, and the later WKSI automatic shelf rules, were the furthest move in the direction of "issuer registration" that the SEC was prepared to entertain, in order to avoid a radical departure from the historic approach to the regulation of securities offerings in the United States and the corresponding approaches taken in other countries.

We therefore believe that the best way to implement the goal of making it easier for a reporting issuer to raise capital through public offerings following its IPO is to adopt a WKSI model, similar to that in the United States, under which issuers meeting the appropriate qualifications could immediately create and use a shelf prospectus, without prior regulatory review or approval, to sell prospectus qualified securities. This approach also has the advantage of being well-understood among U.S. and other global market participants. It does not entail a radical departure from the current regulatory framework in which privately placed securities are subject to resale restrictions, distinguishing them from prospectus-qualified securities.

6. Streamlining the timing of disclosure (e.g., semi-annual reporting)

We acknowledge that there are significant costs and management time involved in complying with quarterly financial reporting obligations. This compliance burden may be particularly challenging for smaller issuers or issuers that are otherwise resource or capital-constrained.

Having said that, we believe that it may be problematic for Ontario to adopt a semi-annual financial reporting regime while other CSA jurisdictions and the United States still require quarterly financial reporting. Issuers are likely to be subject to the reporting requirements of some or all of those other provinces and territories, or will likely need access to those capital markets as they mature, following which they will have to follow the quarterly reporting requirements of those other jurisdictions. Further, issuers are likely to be under competitive pressure to report their financial results quarterly, so long as their competitors in other jurisdictions, including in the United States, are required to report financial results on a quarterly basis. Harmonization with both Canadian and U.S. reporting requirements should continue to be a priority for regulatory reform.

To the extent this initiative were to be pursued, we would suggest limiting the availability of semi-annual reporting to the existing "venture issuer" category of reporting issuer, which already provides for a modified set of public reporting standards and requirements.

We are also open to a streamlined reporting alternative for smaller issuers to have the option to have reduced reporting compliance for the first and third quarters – a regime that balances investor demand for information and reporting with the regulatory burden and

costs associated with quarterly reporting. However, a broad-based move away from quarterly reporting for larger issuers would create a divergence between Ontario and the rest of the CSA jurisdictions and the United States that we believe to be too significant.

We do not believe that any changes should be made without a broader consultation, including of other foreign jurisdictions to assess the pros and cons of competing reporting models.

7. Introduce an alternative offering model for reporting issuers

We acknowledge that the costs associated with preparing and filing a prospectus may be a burden to smaller issuers. However, the extent to which these costs are a barrier to capital raising is not clear to us given the availability of existing private placement exemptions. While an alternative offering model is appealing in concept, we do not believe such a model, if adopted only in Ontario, would significantly increase access to capital for small or large issuers, other than perhaps access to the retail investor market (subject to the annual limit for capital raising under this proposed exemption). Most issuers who access the capital markets rely on the ability to sell securities to investors in multiple Canadian jurisdictions and in the United States in order to meet their fundraising needs. We believe that issuers are reasonably well-served by the current private placement framework, which permits access to institutional and high net worth retail investors in multiple jurisdictions at a reasonable cost. We also have concerns that the retail investors who are a target market for sales of securities under the proposed alternative offering exemption would not have the statutory protections associated with the purchase of securities pursuant to a prospectus.

We believe that harmonization of the regulatory framework for capital raising with other CSA jurisdictions and with the United States should take priority over the adoption of an alternative offering model for reporting issuers. In this regard, we are of the view that the WKSI approach in proposal 12 is preferable as a way to achieve the objective of facilitating access to capital markets by reporting issuers.

8. Introduce greater flexibility to permit reporting issuers, and their registered advisors, to gauge interest from institutional investors for participation in a potential prospectus offering prior to filing a preliminary prospectus

Differences in "testing the waters" ("**TTW**") rules in Canada and the United States have increasingly complicated cross-border offerings of securities. Simply put, the more flexible rules with respect to TTW activities in the United States facilitate capital formation in the United States without any identifiable prejudice to the interests of investors, while the Ontario rules prohibiting "gun jumping" (which were originally based on the now-reformed U.S. rules) for the most part still prohibit TTW in Ontario, making the Ontario capital markets much less attractive as issuers cannot take advantage of this important tool.

This has led and, absent change, will continue to lead, to situations in which TTW meetings are available to U.S. investors but unavailable to Canadian investors on the same offering.

The major differences between U.S. and Canadian TTW rules include:

- TTW is now available in the United States pursuant to Rule 163B under the U.S. Securities Act for any issuer, at any time, whether in connection with an IPO, new issue or secondary offering. TTW is only permitted in Canada in connection with an IPO, and even in that context, in a much more rigid and less useful way.

- TTW is not permitted in Canada during the 15-calendar day period prior to the first public filing of a preliminary prospectus. There is no such restriction under U.S. TTW rules.

- TTW is not permitted in Canada where the issuer is a "public issuer" or in certain circumstances where the issuer is owned by a public issuer (e.g., in the context of a spin-out IPO by an existing public company).

We strongly recommend that the OSC and other CSA jurisdictions amend the existing TTW rules in Canada to harmonize them with those in the United States.

By way of background, the JOBS Act mandated that emerging growth companies ("**EGCs**") be permitted to "test the waters" by having discussions with qualified institutional buyers and institutional accredited investors to assess their interest in participating in a public offering before the issuer undertook the time and expense of preparing a registration statement for the offering. While TTW activities pursuant the JOBS Act reforms only applied to EGCs, the SEC subsequently adopted Rule 163B to expand the relief to all companies, not just EGCs. It is now fully permissible for any issuer, at any time – whether before or after filing a registration statement – to test the waters in the United States.

We therefore support expansion of the existing Canadian TTW rules to more closely align them with U.S. TTW rules.

9. Transitioning towards an access equals delivery model of dissemination of information in the capital markets, and digitization of capital markets

We are supportive of an accelerated transition towards an access equals delivery model of dissemination of information. We refer you to our comment letter provided in response to CSA Consultation Report 51-405 – Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers[1].

10. Consolidating reporting and regulatory requirements

We are very supportive of any effort to streamline reporting requirements. The current regime of patchwork requirements strewn through multiple National, Multilateral and Local Instruments is disconcerting and less than ideal. For example, it is not uncommon to have to refer to multiple instruments simultaneously to understand the use of a defined. For a regulatory regime to be effective, its rules much be clear and readily accessible. The current regime does not meet this standard. Specific proposals that could improve streamlining reporting requirements include:

- Introducing a concept similar to Regulation S-K and Regulation S-X of the United States, where there is a central repository of uniform definitions and requirements that could then be cross-referenced in specific National, Multilateral and Local Instruments. This would ensure that no matter what requirement was being addressed, whether in a prospectus, an annual report or a quarterly report, the requirement would be the same, and easily located.

- Eliminating the requirement for an AIF and consolidating the non-duplicative requirements of that form in an annual and quarterly financial report (like a report on Form 10-K or Form 10-Q in the United States), together with management's discussion and analysis ("**MD&A**"). We note that many Ontario issuers have adopted the practice of including significant duplication of content from their AIF in their MD&A so that the MD&A can serve as a comprehensive source of all relevant information about the issuer. Adopting a single, consolidated reporting form would eliminate this unnecessary duplication.

- Streamlining the business acquisition rule requirements to be consistent with reporting requirements that arise elsewhere and also raising the threshold for requiring one. We note that the CSA has recently adopted amendments to reflect these changes.

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[1] https://www.osc.gov.on.ca/en/com_20200310_51-405_osler-hoskin-harcourt.htm

- Ensuring that the OSC website maintains up to date consolidations of all National, Multilateral and Local Instruments. We note that the OSC has recently confirmed its intention to maintain consolidated instruments on its website and we encourage the OSC to consider the models for publication in British Columbia and Alberta.

11. Allow exempt market dealers to participate as selling group members in prospectus offerings and be sponsors of reverse-takeover transactions

We note that the CSA previously determined to reduce the scope of activities that could be performed by exempt market dealers ("**EMDs**") as part of the registration reforms implemented in 2015. We understand that certain market participants and regulators were of the view certain trading and capital raising activities should be performed by registered investment dealers, who are subject to different standards of regulation and compliance. As such, the proposal to allow EMDs to engage in the proposed activities seems inconsistent with the prior policy stance of the CSA.

We note as well that selling group members have no contractual relationship with the issuer (as they are agents of the underwriters or dealers), and so it is unclear whether the proposal to allow EMDs to participate as selling group members would have the intended effect of enabling them to maintain their relationships with issuers following an IPO or opening up additional channels of financing to issuers, including venture issuers.

In particular, given that prospectus offerings involve sales to retail investors and it is our understanding that the CSA were opposed to allowing EMDs to participate in prospectus offerings, we do not believe that it would be consistent to permit selling group sales by EMDs.

Should exempt market dealers wish to participate in the capital markets more broadly than the EMD category currently allows, we believe that they should be subject to minimum standards of regulation and compliance more appropriate for a dealer participating in public offerings.

12. Develop a Well-Known Seasoned Issuer Model

We are very supportive of developing a WKSI model similar to that which exists in the United States. The three key advantages of this model are: (i) its successful track record of use in the U.S. capital markets, (ii) the relatively limited changes to existing rules that would be required in Canada to implement this model (as compared with an alternative offering model or some of the other proposals referred to in the Consultation Report which constitute more radical departures from the current regulatory framework), and (iii) the fact that adopting this model would be consistent with efforts to harmonize Canadian rules relating to capital raising with U.S. rules.

While we would not propose specific qualification standards for a Canadian WKSI, we would urge that appropriate consideration and consultation be given to establish the appropriate standard at which to set the bar for allowing Canadian seasoned issuers at a certain level to self-police their own automatic shelf prospectuses.

13. Prohibit short selling in connection with prospectus offerings and private placements

We strongly support the harmonization of the regulatory framework for capital raising with other CSA jurisdictions and with the United States. We are aware that the absence of rules that are comparable to Rule 105 of Regulation M in the United States has led to situations where short selling by investors in connection with prospectus offerings in Canada has occurred, which can negatively impact the share price of the issuer conducting the offering. As such, we are supportive of adopting comparable restrictions in Canada to those in Rule 105. We believe it would be preferable and more expedient for the restrictions to mirror those in Rule 105 in order to avoid regulatory arbitrage and to facilitate harmonization of Canadian rules with U.S. rules. As such, we believe the commencement date and duration of the restrictions should align with U.S. restrictions.

14. Introduce additional Accredited Investor (AI) categories

We would not object to the expansion of the categories of AIs that reflect expertise or financial competency, provided that such additional categories have clear triggers for their applicability to ensure that issuers have the ability to verify the availability of the AI exemption to such persons.

On August 26, 2020, the SEC adopted a number of amendments[2] to the AI definition in the United States, which are noted as being part of the SEC's "ongoing effort to simplify, harmonize, and improve the exempt offering framework, thereby expanding investment opportunities while maintaining appropriate investor protections and promoting capital formation." The approach taken by the SEC is one that the Taskforce should carefully review and consider recommending in its final report. The level of requisite proficiency required to avail the issuer of an AI exemption on the basis of proficiency and education should be carefully considered and subject to public consultation.

In the same release, the SEC also expanded the definition of "qualified institutional buyer" in Rule 144A.

The use of Rule 144A to permit expedited sales (without the need to comply with trade reporting obligations) to significant institutional investors is an important exemption in the

[2] https://www.sec.gov/news/press-release/2020-191

United States that facilitates significant capital formation. We strongly encourage the Taskforce to recommend that the OSC adopt an equivalent exemption to Rule 144A to permit distributions to significant, sophisticated institutional investors in Ontario without being subject to a reporting requirement for the sales made under that exemption. Rule 144A permits the resale of securities to "qualified institutional investors" ("**QIBs**") in the United States in a more streamlined and efficient manner than conventional private placements. In our view, the adoption of a crisp, new Ontario streamlined prospectus exemption for Canadian recognized institutional sophisticated purchasers (perhaps to be called CRISPs), without any associated trade reporting requirement, would be a significant advancement in the development of Ontario as a global capital market.

To that end, we question the continued benefits of the requirements of reporting under NI 45-106 and OSC Rule 72-503. One of the stated purposes of the expansion of trade reporting was to provide insight into the exempt market to permit the regulators to have visibility into the transactions occurring in the exempt markets. At this point the OSC and the CSA should have sufficient visibility into the exempt markets to have a deep understanding of the nature of exempt transactions and capital markets participants participating in the exempt market. Given the significant burden of the details required in the trade reporting forms, we would encourage the Taskforce to recommend looking at opportunities to pare back or entirely remove the reporting obligations.

15. Expediting the SEDAR+ project

We are very supportive of the goal of the SEDAR+ project and its timely implementation. We share the Taskforce's view that its introduction should be accelerated. The hallmark of any effective regulatory regime is clarity and ease of access. With the current patchwork of SEDAR, SEDI, the NRD, the CTO and the DL, easily accessing information is a challenge. SEDI reporting in particular is so cumbersome its utility to market participants is questionable. Accelerating the SEDAR+ initiative is important to market efficiency and investor protection. Developing an easy-to-use "one-stop shop" for accessing public disclosure documents, insider report filings and other information is long overdue and must be a key component of any modernization effort.

The SEDAR+ project should complement the adoption of an "access equals delivery" model for reporting, where all disclosure is centrally available. Please see our response to proposal 9.

Some additional suggestions for the SEDAR+ project include:

- Access should be provided to consolidations of current National and Multilateral instruments, specific charging legislation and local instruments and policies.

- Filings should be permitted 24 hours a day, 7 days a week without restriction.

- Filing categories for SEDAR should be amended to actually match what is required in securities legislation and duplicate or excessive categories should be removed.

- Access to certain categories of documents should be made available to the public immediately.

- Users should be permitted to more clearly trace issuer name changes and corporate actions that have resulted in reporting issuers changing their name. SEDAR users should have an easy ability to trade predecessor and successor company information, irrespective of name changes, and have the ability to search by current and former issuer names (irrespective of how an issuer has modified its profile).

- Consolidated trade reporting (to the extent still required and not removed as we noted in our comment to proposal 14) and exemptive relief filings should be permitted through a single portal to all regulators, rather than through unique portals for each province.

- A method should be provided for issuers to remove or make private documents that were made public that clearly contain errors (draft watermarks, etc.…). While we appreciate there are policy concerns in respect of revoking documents, a short period of time to replace a document should be acceptable.

Promoting Competition

16. Enact a prohibition on registrants benefiting from tying or bundling of capital market and commercial lending services, and a requirement for an attestation by a senior officer of the appropriate registrant under the applicable disclosure requirements.

We do not agree with this proposal, nor do we agree with the assumptions that appear to underlie it. It appears that the Taskforce has proposed a radical change to the regulation of the Ontario securities market on the basis of anecdotal complaints from independent securities dealers who do not feel they are able to compete effectively under the existing rules of an already robustly competitive marketplace. The Taskforce has not provided any empirical evidence to support the proposition that independent dealers are not in fact fully able to compete with bank-owned dealers, or any review or evaluation of the draconian consequences of the proposed resolution – which would be, by legislative mandate, to prohibit Canadian businesses from having freedom of choice when selecting their commercial lenders and investment bankers. While the proposal is characterized as an effort to “level the playing field”, we believe it is misguided in assuming that handicapping the strongest and most successful Canadian investment banks in their ability to compete fully and fairly for capital markets engagements, in Ontario, in Canada, and globally, is

appropriate. One of the potential unintended consequences of adopting this proposal would be to drive capital raising by Canadian issuers into U.S. and other foreign capital markets, at the expense of all dealers in Ontario. The proposal as framed would in fact create an unlevel playing field, raise significant constitutional questions and put the Ontario government and the regulator in a position of power through which it would pick the "winners" and "losers" in what would no longer be a level, competitive market, unjustifiably interfering with market efficiencies.

While ensuring fair competition in the capital markets is a laudable goal, we believe that fair competition can only be achieved through preserving the freedom of choice for Ontario issuers to be able to select which investment banks to hire as their underwriters and which banks to use as their lenders. These choices should be made on the basis of all of the factors that are taken into account by consumers making purchasing decisions in a properly-functioning, fully competitive marketplace, including both price and quality of the services provided. Investment banking and commercial banking services are not commodities, they are professional services where the value that is delivered by one provider may vary significantly from the value provided by another provider. In the case of investment banks, the breadth and depth of industry expertise, the network of relationships with significant investors, the ability to offer analyst coverage and the ability to access investors in other countries through a multi-national or global presence are some of the factors that make investment banking a competitive business. Further, we believe it is in the best interests of issuers to have the opportunity to negotiate for lower costs of capital, and potentially lower interest rates on commercial loans, through "bundling" of investment banking and commercial lending services. Canadian issues must not be deprived of the ability to select their investment banking service providers on the basis of these criteria in the name of "levelling the playing field". The goal of enhancing Ontario's position as a globally respected, world-class capital market would, in our view, be seriously undermined by such action.

We believe that any appropriate concerns underlying the proposal are already sufficiently addressed by existing regulations. In addition to the existing Bank Act prohibition on coercive tied selling referenced in the Consultation Report, tied selling or bundled pricing which has had, is having or is likely to have the effect of substantially lessening or preventing competition may be subject to challenge under the tied selling provisions or the abuse of dominance provisions of the Competition Act. These are provisions actively enforced by the Bureau and adjudicated by the specialized expert Competition Tribunal. There is body of jurisprudence governing the interpretation and application of these provisions across a range of industry sectors as well as enforcement guidelines and bulletins informing the business and legal communities of the Bureau's enforcement practices.

Canada's competition framework includes a pre-existing straightforward method for stakeholders to engage the Bureau and indeed to compel a Bureau investigation into tied selling or bundled pricing practices of any participant in our capital markets.

We do not believe there is a need to duplicate the Competition Act provisions at the provincial level for a specific industry sector and, in fact, such duplication may be confusing as a matter of law and enforcement practice.

17. Increase access to the shelf system for independent products

We strongly encourage the Taskforce to undertake broad-based consultation prior to making any recommendations relating to this proposal. There are potentially significant implications to the Ontario capital markets and any determinations or recommendations should only be made after very careful review, analysis and consultation, given the potential impacts on Ontario investors and on capital markets participants with different business models . Any consultation should consider the impact of the Client Focused Reforms recently adopted by the CSA, including "know-your-product" obligations.

18. Introduce a retail investment fund structure to pursue investment objectives and strategies that involve investments in early stage businesses

We are very supportive of any initiative that enables retail investors to invest in high quality businesses and enjoy access to the same investing opportunities as high-net worth and institutional investors. However, we are concerned that a fund that invests in private businesses would require the fund to operate with reduced transparency and liquidity opportunities and a less diversified portfolio than is currently seen as acceptable for the retail market under our Canadian securities laws. In addition, the enhanced know-your-product, know-your-client and suitability requirements that are being introduced as part of the Client Focused Reforms may make it difficult for dealers to facilitate investments by retail investors in a private fund with a concentrated portfolio of illiquid assets with reduced redemption and withdrawal opportunities. Given the nature and timing of private business financial statement requirements and visibility into operations of investee companies by fund managers, it may be difficult to provide a timely and accurate fund valuation for any issuances and redemptions of units of the fund. In addition, with the enhanced "know-you-product" and "know-your-client" obligations and the structural challenges related to a fund of private businesses, we wonder whether such an initiative would provide a meaningful new source of financing for small businesses. At this point, we think that a more realistic option would be for the OSC to continue to focus on the reduction of regulatory burden for reporting issuers in order to encourage management of high quality business to go public by pursuing IPOs and listings in Ontario. We believe that further considered input into the appropriate protections for retail investors in a fund of private businesses is necessary in order to determine, among other things, the appropriate protections for retail investors if

this initiative is pursued. Appropriate protections could include whether a minimum offering size would be necessary, whether a minimum number of investments by a fund would be necessary for diversification, the extent of any limitations on redemptions that would be appropriate, what would be a fair and uniform methodology for determining net asset value and whether it would be appropriate for such a fund to be in continuous distribution.

19. Improve corporate board diversity

We strongly support the goal of increasing diversity in all its forms on corporate boards and in workplaces. We are extremely proud of our long line of annual research reports on diversity practices among TSX-listed issuers, which have not only tracked progress on diversity practices among the 700+ companies subject to diversity disclosure obligations, but have also informed readers on new developments in the area and examples of disclosure best practices.[3] This year we are also reviewing data for public companies subject to the new diversity disclosure requirements of the Canada Business Corporations Act ("**CBCA**") We were also pleased to develop with the Institute of Corporate Directors a customizable, downloadable board diversity template to help organizations of any size prepare a written diversity policy, and late last year that template was further updated to address the diversity characteristics identified in the CBCA, as well as any other chosen diversity characteristics.[4] Our lawyers regularly speak at events on improving diversity in organizations and participate in industry initiatives, such as the research being conducted by the Conference Board of Canada's Women on Boards Project, to identify the best ways to promote increased diversity.

With respect to the representation of women, our research has shown gradual year-over-year progress on the proportion of board seats held by women and a similar steady but slow increase in the adoption of practices to help further gender diversity on the board and among senior leadership at Canadian public companies. Companies in the S&P/TSX 60 Index consistently lead the way in the adoption of best practices to support diversity and inclusion and in the representation of women.

Diversity Recommendations in the Consultation Report

The Consultation Report proposes to require companies to set diversity targets to prescribe what the minimum targets should be and to impose timelines for these targets to be achieved. As noted above, we strongly support the goal of increasing diversity in all its forms on corporate boards and workplaces, but we have serious concerns regarding the

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[3] https://www.osler.com/en/resources/governance/2019/2019-diversity-disclosure-practices-report-women-in-leadership-roles-at-tsx-listed-companies

[4] https://www.webmerge.me/capture/13722/smaf3x

proposal to legislate mandatory minimum targets. As we have discussed in our annual diversity disclosure reports, we believe these are more effective ways to encourage greater diversity within corporate Canada and promote equality and inclusion in workplaces and boardrooms.

While progress still needs to be made with respect to the representation of women, it is vital that diversity extend beyond gender. We welcome the Consultation Report's focus on the representation of Canada's Indigenous Peoples and visible minorities. However, we note that extending diversity disclosure raises some additional practical considerations in respect of the implementation of those disclosure requirements. Firstly, we believe that membership in a designated category cannot be determined based on external measures and needs to be based on self-identification. Further, even those self-identifying as being a member of particular group may object to a company counting them as being a member of a particular group for purposes of satisfying its disclosure requirements, even if the individual is not being identified by name in such disclosure. The Consultation Report needs to consider in more detail how to address the personal and privacy interests of such individuals.

We also note that other diversity characteristics beyond those discussed in the Consultation Report, are important to reflecting and benefitting from a diverse workplace and so can be expected to be important to a company, to the execution of its strategy and to its various stakeholders. We did not feel this was adequately reflected in the Consultation Report. Disclosure obligations should afford companies the flexibility to address broader diversity and inclusion objectives, including measuring and/or setting goals, individually or collectively, in a manner that is inclusive of all underrepresented groups, such as differently-abled persons and members of the LGBTQ2+ community. The Consultation Report contains no analysis or rationale as to why it has chosen to focus on specified personal characteristics while appearing to disregard others. It is important that the proposed changes take into consideration requirements under provincial human rights legislation and Canada's Charter of Rights.

The Consultation Report further does not provide any details regarding the basis for the proposed targets of 40% women and 20% BIPOC on Canadian boards. It is a clearly a worthy goal that both the director community generally and individual boards should reflect the diversity of the Canadian population – and based on information from Statistics Canada, one could argue that the overall goal in each case could be higher. However, the Taskforce should consider whether greater flexibility is warranted on an individual company basis to afford companies in different circumstances flexibility if needed to recruit individuals with specific expertise, and whether setting targets for the representation of women and BIPOC could impede the flexibility companies need to achieve greater diversity in both those areas as well as other areas of diversity.

If a prescribed target is to be recommended by the Taskforce, the Taskforce should consider commissioning dedicated research on this issue given the broad range of considerations and perspectives, as well as available research and information relevant to such a recommendation, that has already been undertaken both within Canada and in other jurisdictions. For example, the Taskforce should consider (i) the existing objectives of other organizations and the findings and recommendations of similar review committees (including the goal of the 30% Club Canada for 30% of board seats to be held by women by 2022 and the recommendations of the U.K. Parker Review Committee's recommended objective for each FTSE 100 and FTSE 250 board to have at least one "director of colour" (the term used by the Parker Review Committee) by 2021 and 2024, respectively), (ii) the strong interest demonstrated by and stated objectives of certain institutional shareholders in this regard, (iii) that shareholders of several financial institutions rejected shareholder proposals seeking a 40% target for female directors at those financial institutions this past proxy season, and (iv) other relevant long-term demographic and social trends.

We also have a number of technical concerns with the Consultation Report's proposal and the manner in which it would be implemented.

It is unclear from the Consultation Report whether the intention is to require issuers to set targets and report on:

(a) women, Black people, Indigenous people, and people of colour collectively;

(b) separately for (i) women and (ii) Black people, Indigenous people, and people of colour collectively; or

(c) separately for women, Black people, Indigenous people, and people of colour.

This is especially important for companies governed by the CBCA which are already subject to an obligation to provide diversity disclosure separately for each of the four "designated groups" under the Employment Equity Act. Expansion of diversity disclosure requirements under securities laws or adoption of requirements which conflict with corporate law diversity disclosure rules could result in a multiplicity of conflicting disclosure rules that would add additional cost and, perhaps more importantly, risk creating confusion and duplication that could reduce the clarity and effectiveness of the disclosure and its ability to meet the important public policy objectives the disclosure is designed to achieve.

The Consultation Report does not define what is meant by the different diversity characteristics to which it does refer. If disclosure is to be provided regarding certain diversity characteristics, those need to be carefully defined to ensure that intended individuals are included and the exclusion of individuals who might self-identify as being within the category are not inadvertently excluded. For example, under the diversity

disclosure requirements under the CBCA, distributing companies are required to provide disclosure with respect to "Aboriginal peoples". That term is defined to mean persons who are Indians, Inuit or Métis. There may be some confusion on who would be included in each of those categories, although none of them would appear to include, for example, the indigenous people of Australia.

We believe that membership in a designated category needs to be based on self-identification, which is personal and may also be private. Any proposal, including any proposed target, needs to take into consideration personal and privacy interests of individuals. Even individuals who self-identify as being a member of a particular group may object to the issuers counting them as being a member of a particular group for purposes of satisfying its disclosure requirements, even if the individual is not being identified by name in such disclosure.

If targets are to be required at the board level, it is important to provide issuers with a sufficient number of years to achieve them in an orderly fashion to avoid excessive board turnover to the detriment of issuers and their shareholders and other stakeholders. We do not think a requirement to adopt prescribed targets at the senior management level is appropriate in light of human rights and other legal, procedural and cultural concerns of requiring disclosure of targets.

Term Limit Recommendations in the Consultation Report

We support the use of voluntary term limits by boards as a means of ensuring that there is an appropriate level of board turnover and facilitating orderly succession-planning for board roles. However, we note that term limits are only one possible tool that boards may engage to facilitate board turnover and succession-planning.

We are not aware of any other jurisdictions that mandate term limits. Rather, service on the board for more than a specified period of time is only a factor to be considered in assessing the director's independence. Under the U.K. Corporate Governance Code, service on the board for more than nine years is a factor to be considered by the board in assessing whether the director is independent. In Australia, the latest version of the Australian Securities Exchange Corporate Governance Principles and Recommendations recommends that the board regularly assess the independence of any director who has served for more than 10 years but does not deem such an individual to be non-independent. In France and other European jurisdictions an independence concern does not arise until after 12 years of service.

Few Canadian companies have adopted term limits. Of those that have done so, most set a limit that is more than 10 years. Spencer Stuart's 2019 Canadian Board Index notes that of the 100 companies surveyed, retirement ages were used exclusively at 22 companies, nearly one-quarter (24%) used age and term limits together and only 11 boards used term

limits exclusively, set at either 12 or 15 years of continuous service (and most of these boards disclosed that they made case-by-case extensions of a term for individuals who reached their limit). The 2018 Korn Ferry report on Corporate Board Performance and Director Compensation also states that 12 to 15 years is a more common limit for those companies that have adopted term limits. The authors report that of the companies surveyed in 2017, 4% had a 10-year limit, 6% had a 12-year limit, 8% had a 15-year limit and 1% had a 20 -year limit. Approximately 78% had no term limit and 4% did not provide disclosure.

The introduction of mandatory term limits would be disruptive to public companies and, depending on the limit mandated, could result in substantial board turn-over that could be detrimental to Canadian public companies and those who invest in them. This could be especially damaging if it occurred in the middle of a crisis or a fundamental change in strategy. Imposing a mandatory term limit also would be inconsistent with Canada's approach to corporate governance matters – which, since the report of The Toronto Stock Exchange Committee on Corporate Governance chaired by Peter Dey, has relied upon disclosure against guidelines. And, since the election of directors is fundamentally a matter of corporate law, we are concerned about the propriety of introducing mandatory term limits for directors as a securities law matter rather than as an amendment to corporate law.

Proxy Advisory Firms

20. Introduce a regulatory framework for proxy advisory firms (PAFs) to: (a) provide issuers with a right to "rebut" PAF reports, and (b) restrict PAFs from providing consulting services to issuers in respect of which PAFs also provide clients with voting recommendations

Our public company clients have long been frustrated in their dealings with PAFs. As recognized in the recent rule-making of the SEC, PAFs act as an intermediary between issuers and the institutional investors that invest in the issuers' securities. As such, they play an important role in cost-effectively analyzing large volumes of public company disclosure to enable their clients to exercise their voting rights. But they also contribute to a dissociation between ownership and voting among institutional investors and a perception that voting is based on concern or interests other than investment objectives.

The SEC has released its final rule with respect to the regulation of PAFs and compliance will be required by December 1, 2021. Given the integrated nature of the U.S. and Ontario capital markets, and the fact that the principal PAFs operating in Ontario operate cross-border, we think that any rule-making in Ontario should align with the new SEC rules. In particular, the SEC found that prescribing timeframes for PAFs to provide issuers with a right of prior review of draft PAF reports and a requirement that a link to any rebuttal by the issuer be included in the materials the PAF submits to its clients, were unworkable.

Ownership Transparency

21. Decrease the ownership threshold for early warning reporting disclosure from 10 to 5 per cent

The CSA previously carefully considered a proposal to amend the early warning reporting disclosure threshold to 5%. At the time, as a Firm, we supported the proposal to reduce the early warning reporting threshold from 10% to 5%, provided that certain other significant changes were made to the regime. Please refer to our comment letter provided to the CSA.[5]

We note that although a change from a 10% threshold to a 5% threshold would align the reporting threshold with the requirements in the United States, absent other changes, such a change to the threshold alone would make Canada a jurisdiction with significantly more onerous rules than any other jurisdiction in the world, given the requirement to press release promptly combined with the acquisition moratorium pending prescribed disclosure having been filed. Should the Taskforce determine to recommend a reduced threshold, we encourage careful review of the timing requirements for disclosure and the applicability of an acquisition moratorium to ensure any revised reporting obligations are not unduly burdensome or more onerous than other jurisdictions.

On the other hand, we acknowledge that the CSA, having considered the proposal previously, rejected a similar change to the early warning reporting regime. At the time, the CSA disclosed that a majority of submissions received were opposed to the change, which we understand was largely from the investor community. The CSA acknowledged a variety of unintended consequences that could arise from a reduced reporting threshold. As such, we encourage the Taskforce to appropriately consider the CSA's prior reflections.[6]

Any changes to the existing disclosure framework could have significant consequences to the Ontario capital markets and, as such, we strongly encourage the Taskforce to undertake further consultation and review and analysis prior to making any recommendations in this regard.

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5 https://www.osc.gov.on.ca/documents/en/Securities-Category6-Comments/com_20130722_62-203__osler-hoskin-Harcourt.pdf

6 https://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20141010_62-307_proposed-admendments-multilateral-instrument.htm

22. Adopt quarterly filing requirements for institutional investors of Canadian companies

We do not support mandating quarterly filings for institutional investors of their holdings in securities of Canadian reporting issuers, with or without the thresholds proposed by the Taskforce. The existing early warning or alternative monthly reporting frameworks should provide Ontario investors and market participants with all necessary information about the large portfolio holdings of institutional investors. We believe that requiring institutional investors to make regular disclosure of their entire portfolio holdings would impose undue burdens on institutional investors and compromise their ability to maintain the confidentiality of their proprietary trading strategies, without providing any significant additional investor protection benefit. We also note that the SEC has recently proposed significant amendments to its Form 13F reporting regime in the United States, on which this proposal appears to be based. Currently, portfolio managers in the United States are required to make quarterly reports of the contents of their investment portfolios if they hold more than US$100 million in reportable securities. The SEC has proposed increasing that reporting threshold to US$3.5 billion in holdings of reportable securities, suggesting recognition that the current Form 13F reporting requirement imposes undue compliance burdens on many of the institutional investors currently required to file Form 13F quarterly reports.

In lieu of introducing an additional portfolio reporting regime, we recommend that the Taskforce consider modernization the existing early warning reporting and alternative monthly reporting regimes, including the categories of investors that should be eligible for the alternative monthly reporting regime, whether the press release requirements under the conventional early warning reporting system remain necessary and appropriate, and whether other improvements could reduce unnecessary compliance burdens that may currently discourage institutional investors in Ontario, and globally, from making investments that exceed the reporting thresholds. Please also see our comments on proposal 21 regarding the proposed decrease in the current 10% reporting threshold.

Shareholder Rights

23. Require TSX-listed issuers to have an annual advisory shareholders' vote on the board's approach to executive compensation

As noted in the Consultation Report, other jurisdictions have mandated the use of "say on pay" votes. Such requirements were the result of a political reaction to widespread public criticism over excessive executive compensation levels in those jurisdictions. As Canada has not shared a similar experience, say on pay in Canada has to date proceeded on a purely voluntary basis. Adoption has gradually increased over time. Companies have adopted say on pay for different reasons, including:

- in response to a shareholder proposal;
- in response to written requests from institutional shareholders that are not formal shareholder proposals;
- in order to align, to some extent, with U.S. domestic issuers who are required to conduct periodic advisory say on pay votes;
- because others in their industry do so; or
- because they wish to be viewed as a leader in corporate governance best practices and shareholder engagement.

In its 2019 Canadian Proxy Season Review, Laurel Hill and Gryphon Advisors reported that in the 2019 proxy season 196 issuers conducted a say on pay vote. In contrast, Kingsdale Shareholder Services reported that 297 Canadian issuers were providing voluntary say on pay votes.

Although the number of voluntary adopters continues to increase year-over-year, the increase is gradual, and the vast majority of Canadian issuers do not provide a say on pay vote. Shareholder proposals on say on pay have focused on large issuers.

The case for the adoption of say on pay as a governance matter is not strong. It allows shareholders to express dissatisfaction with compensation arrangements, although the vote itself does not provide information about the nature of the compensatory concern. And a similar result could be achieved by simply withholding from voting for the compensation committee chair. Since say on pay exists in other international jurisdictions, we are not concerned that issuers will move to other capital markets if it becomes mandatory to conduct a say on pay vote. However, introducing a say on pay vote would increase costs to issuers and their investors, which would be another reason for smaller issuers to remain private and delay going public.

24. Empower the OSC to provide its views to an issuer with respect to the exclusion by an issuer of shareholder proposals in the issuer's proxy materials (no-action letter)

We see no value to this proposal. Shareholder proposals are governed by corporate legislation in Canada and the submission of such proposals has been the subject of judicial review. Absent simultaneous changes to the corporate legislation in every Canadian jurisdiction, acceptability or not of shareholder proposals is a matter that would continue to be addressed by courts, regardless of any views the OSC may be willing to express. We note that adjudication of shareholder proposals is a matter that takes up significant SEC

resources every year. We think the resources of the OSC could be better allocated to enforcing compliance with existing securities law requirements.

25. Require enhanced disclosure of material environmental, social and governance (ESG) information, including forward-looking information, for TSX issuers

There is investor interest in improved disclosure regarding environmental and social information ("**E&S**") and the issuer's governance of E&S matters. This interest has prompted several extensive studies and resulting guidance from the OSC and the CSA over the years, including:

- a disclosure review of environmental disclosure by the OSC in 2007;
- publication of OSC Staff Notice 51-716 – Environmental Reporting in 2008 summarizing the results of the OSC's review and providing guidance on disclosure obligations;
- publication of OSC Notice 51-717 – Corporate Governance and Environmental Disclosure in 2009 to communicate the OSC's plans regarding disclosure of corporate governance and environmental matters;
- publication of 51-333 - Environmental Reporting Guidance in 2010 to provide expanded guidance on environmental reporting;
- a disclosure review of climate change disclosure by the CSA in 2017;
- publication of CSA Staff Notice 51-354 – Report on Climate change-related Disclosure Project in 2018 providing an update on the progress of the review and an outline of future work in this area; and
- publication of CSA Staff Notice 51-358 – Reporting of Climate Change-related Risks in 2019 to provide detailed guidance on climate change disclosure, including assessing the materiality of such disclosure for disclosure purposes.

Issuers looking to provide disclosure on a voluntary basis face a daunting array of alternative reporting standards, with varying degrees of complexity and relevance to issuers in different industries. Compliance with all of these alternative standards would lead to substantially higher costs, especially for smaller issuers, without providing any assurance that the resulting disclosure would be meaningful to the issuers' investor base. While the major reporting frameworks are working to align their standards with a view to reducing the reporting burden on issuers, there is considerably more work to be done in this area.

We note that investor interest in E&S disclosure is not uniform. While some investors seek specific information on a particular issuer's practices others are looking for detailed consistent comparative information to enable them to better assess the E&S risks of their investment portfolios.

We believe the best approach to E&S disclosure is to encourage an ongoing dialogue between an issuer and its investors on disclosures that the issuer can provide which would be meaningful to its investors. In light of existing uncertainty, we are concerned that requiring enhanced disclosure of specified measures or approaches or mandating disclosure in compliance with a prescribed chosen standard would substantially increase the burden on issuers without a corresponding benefit to investors and could result in the Canadian disclosure requirements being out of sync with those of other jurisdictions or investor interests and needs over time. On the other hand, we believe all investors would benefit from an understanding of an issuer's approach to board oversight of E&S as a governance matter and implementing a requirement that issuers provide specific disclosure of the board's role in this area would be meaningful without being overly burdensome. Indeed, this approach is contemplated in the framework of the Task Force on Climate-related Financial Disclosure.

Proxy Contests and M&A Transactions

26. Require the use of universal proxy ballots for contested meetings where one party elects to use a universal ballot, and mandate voting disclosure to each side in a dispute when universal ballots are used

We support the use of universal proxy ballots as a way to simplify the voting process for investors. Universal proxies have been used a handful of times in Canada, although the choice to use one has been prompted largely by a desire for strategic advantage rather than for purposes of levelling the playing field.

We support the recommendations of the Universal Proxy Working Group in their response to the 2016 SEC proposing release.[7] Any proposal for adoption of a universal proxy will need to include a prescribed format for the disclosure to ensure clarity and fairness in execution of voting instructions, including specified format requirements for any voting instruction process adopted by intermediaries for obtaining proxy instructions from their clients, the beneficial owners.

While we strongly support prescribing the format for use of a universal proxy, we think a requirement that issuers and dissidents must use a universal proxy creates several practical

[7] https://www.cii.org/files/issues_and_advocacy/correspondence/2020/UPWG%20final%20letter%20dated%208-6-20.pdf

challenges. For example, the issuer would need to receive advance notice from any potential dissident of the names of any additional nominees a dissident proposes to nominate at the meeting. While deadlines for receipt of shareholder proposals with director nominees would provide the issuer with sufficient time, advance notice provisions for director elections in Canada typically permit a dissident to provide notice as little as 30 days prior to the meeting – which is well after most issuers have sent out their materials. In particular, we think it would be inappropriate to require management to use a universal proxy if, after or shortly before management sends out its materials, the dissident chooses to use one since it would effectively require management to send yet another proxy to shareholders, at additional cost and the risk of confusing shareholders.

Finally, in light of the close integration of Canadian and U.S. voting systems, any proposals regarding use of a universal proxy in Canada should be aligned with U.S. requirements and practice.

27. Amend securities law to provide additional requirements and guidance on the role of independent directors in conflict of interest transactions

We oppose wholesale codification of the best practices described in Multilateral Staff Notice 61-302 - Staff Review and Commentary on MI 61-101 ("**Staff Notice 61-302**") and OSC decisions.

Our concerns with codification are twofold.

First, the proposal increases complexity. Conflict transactions generally give rise to a mix of corporate and securities law issues, as recognized by Staff Notice 61-302 and as is evident from the range of OSC decisions addressing such transactions. The legal regime governing conflict transactions historically included the legal requirements of MI 61-101 as well as the policy guidance of Companion Policy 61-101 that apply to certain types of conflict transactions absent the availability of an exemption (i.e., enhanced disclosure, formal valuation and minority shareholder approval), OSC case law, and applicable corporate law that governs corporate transactions such as arrangements, amalgamations and capital reorganizations and that recognizes the critical importance of the business judgment rule and therefore limited judicial intervention. Staff Notice 61-302 was intended to supplement the historic regime by providing guidance in the form of a distillation and synthesis of Staff's experience and views and OSC case law, while recognizing that there is no single approach to process design in respect of a material conflict of interest transaction.

Accordingly, material conflict of interest transactions were deliberately defined by Staff Notice 61-302 in a flexible and open-ended manner. Codification would require both defining "material conflict of interest transaction" with a high degree of precision as well as determining the specific application of the various best practices in Staff Notice 61-302

to such transactions. Such codification would increase the complexity of MI 61-101, which in our experience is already considered to be a complex instrument for market participants to navigate without the assistance of sophisticated legal counsel.

Second, we believe the proposal would result in an overly prescriptive and burdensome regime. The facts giving rise to a particular conflict and the materiality of that conflict vary widely from transaction to transaction, and there is no single blueprint for how a board of directors should review, analyze, evaluate and supervise a transaction. Said simply, every deal is different. Accordingly, each transaction is best addressed in a careful and calibrated manner based on a process that is designed having regard for the particulars of the situation and informed, not prescribed, by a combination of rules, case law, guidance from the regulators and the judgment of a board and its advisors. Staff Notice 61-302 recognizes this overriding principle and provides guidance and direction as to best practices for addressing material conflict of interest transactions without being overly prescriptive and giving boards latitude in addressing and neutralizing conflicts. Codifying Staff Notice 61-302 and OSC decisions in MI 61-101 would result in a "one size fits all" set of rules that would result in an overly prescriptive and unduly burdensome regime.

The creation of the OSC Office of Mergers & Acquisitions ("**OMA**") and its real time review program have resulted in Staff taking a more active role in reviewing unfolding conflict transactions in recent years. We believe that this development has increased the protection of minority shareholder interests in conflict of interest transactions and suggest the Taskforce consider whether the OMA has sufficient resources to fulfil this role.

There are, however, some limited changes to MI 61-101 that we believe could increase minority shareholder confidence without creating an overly prescriptive regime. MI 61-101 currently limits the requirement to form a special committee of independent directors to supervise the preparation of a formal valuation in connection with an insider bid. Staff Notice 61-302 indicates that Staff is of the view that a special committee is advisable for all material conflict of interest transactions. We believe it would be appropriate to require the creation of a special committee of independent directors in the following two additional types of material conflict of interest transactions:

(a) "business combinations" where a related party acquires or combines with the issuer; and

(b) "related party transactions" that are not exempt from the formal valuation and the minority approval requirements.

While in practice well-advised boards generally create special committees to consider and oversee such transactions, to the extent that this is not occurring it would be sensible to prescribe formation of such committees through limited amendments to MI 61-101.

28. Provide the OSC with a broader range of remedies in relation to M&A matters

Granting the OSC new powers that align with those recently given to the British Columbia Securities Commission should be explored in greater detail through a fulsome comment period that gives market participants adequate time to properly consider the important policy and jurisdictional issues raised by such changes.

We recognize that aligning the OSC's powers with those of the BCSC would decrease the possibility of undesirable "forum shopping" by market participants and would also continue the trend of the OSC becoming the forum of choice for resolving disputes in M&A matters and proxy contests, as opposed to the courts. Embedding such powers in statute would also clearly formalize powers that the OSC has developed over a long line of decisions, most recently in the Eco Oro decision.

While such developments are potentially positive, they raise important policy questions as to whether hearings before the securities regulators are the appropriate forum for unwinding corporate transactions. We believe that these matters warrant further exploration by the OSC and the market and would welcome the opportunity to review proposed amendments in the context of a fulsome comment period.

Proxy Voting System

29. Introduce rules to prevent over-voting

As the Taskforce is aware, concerns about over-voting have prompted detailed reviews by the OSC over the years. As stated in CSA Multilateral Staff Notice 54-304 - Final Report on Review of the Proxy Voting Infrastructure and Request for Comments on Proposed Meeting Vote Reconciliation Protocols ("**Protocols**"), the Protocols "…lay the foundation for the key entities to work collectively to:

- eliminate paper and move to electronic transmission of vote entitlement and proxy vote information; and
- develop end-to-end vote confirmation capability that would allow beneficial owners, if they wish, to receive confirmation that their voting instructions have been received by their intermediary and submitted as proxy votes, and that those proxy votes have been received and accepted by the tabulator."

The key to solving over-voting is to take advantage of end-to-end voting confirmation, which we understand is currently being piloted in the U.S. In the meantime, we believe the Protocols provide sufficient detail on the standards of behaviour expected of the different participants in the proxy voting system. We believe the proposals summarize the principles

underlying the Protocols. However, as the proposals lack necessary detail to address the many complex mechanisms that have evolved over time to facilitate voting by investors in the various manners they have chosen to employ, a legislative or regulatory initiative to implement the proposals as mandatory requirements is likely to result in substantial confusion and error.

Consistent themes in the review of proxy voting in Canada have been:

- failures in the process by which securities position reports and omnibus proxies make their way to the transfer agent from not only CDS but also DTCC; and

- the failure of timely communication from transfer agents to intermediaries of potential overvoting concerns.

Implementing a rule to require issuers to actively seek out securities position reports and omnibus proxies from CDS and DTCC that have not been received by the transfer agent and to require transfer agents to promptly notify any intermediary of an overvote position would go a long way to facilitating the communications necessary to reduce the risk of any over vote situation at the meeting.

30. Eliminate the non-objecting beneficial owner (NOBO) and objecting beneficial owner (OBO) status, allow issuers to access the list of all owners of beneficial securities, regardless of where securityholders reside, and facilitate the electronic delivery of proxy-related materials to securityholders.

We are not supportive of this proposal.

Ontario securities laws regulate the activities of those engaged in the business of trading or advising in securities and requires such firms, and the individuals employed by them, to satisfy applicable standards with respect to proficiency, internal controls and financial condition and to comply with know your client and suitability obligations and avoidance of conflicts of interest. Securities laws do this because of the importance of the relationship between such intermediaries and their clients and the recognition that the trust underlying such relationships is a fundamental building block to investor confidence in Ontario capital markets. The trust reposing in the relationship between an intermediary and its client underlies the fiduciary duty owed by an intermediary at common law, which includes an obligation of confidentiality. Intermediaries are also subject to duties of privacy under federal and provincial privacy laws, and may be subject to confidentiality obligations under federal, provincial or foreign legislation regulating their activities and their ability to share client information, depending on the type of intermediary.

Information about an investor's investment holdings and contact information regarding the investor in relation to their holdings is personal information or private confidential

information of the investor, and intermediaries have adopted policies and procedures to safeguard such information.

Currently, intermediaries in Canada are required to ask their clients whether the client objects to the intermediary disclosing ownership information about the beneficial owner under National Instrument 54-101 – Communication with Beneficial Owners of Securities of a Reporting Issuer ("**NI 54-101**"). This mechanism recognizes the beneficial owner's right to confidential treatment of their investment holdings and other personal information and the fundamental importance of maintaining the trust of investors in their dealings with their financial intermediary to the maintenance of confidence in Ontario capital markets. The current opt-in regime is consistent with investor expectations. Simply put, investors may not want to receive information via e-mail from the issuer or other persons as permitted under NI 54-101. Eliminating the OBO/NOBO distinction would be inconsistent with the privacy expectations of investors. It would eliminate the ability of an investor to choose to protect their confidential information and would contradict the express wishes of the many investors that have affirmatively chosen not to permit disclosure of such information. It also would conflict with the statutory and fiduciary obligations of intermediaries to their clients.

Issuers are understandably frustrated by their inability to obtain ready access to those beneficial owners who have chosen to withhold their confidential information from the issuer and other persons who wish to access it for sending of securityholder materials to such beneficial owners, in respect of efforts to influence the voting securityholders and in respect of an offer to acquire securities of the reporting issuer. However, generally issuers are most focused on being able to reach those investors which hold a significant block of the issuer's shares. Currently, early warning requirements are triggered only when ownership is at 10%. If the recommendations of the Consultation Report to lower the reporting threshold to 5% were implemented, that would go a long way to addressing the needs of issuers without compromising the confidentiality and privacy concerns of investors.

We also note that the Province of Ontario has oversight over several of Canada's largest institutional investors. In furtherance of the desire for greater transparency of ownership it would be available to the Government of Ontario to require those investors incorporated under or governed by Ontario legislation not elect to be objecting beneficial owners.

Fostering Innovation

31. Create an Ontario Regulatory Sandbox in order to benefit entrepreneurs and start-ups. In the longer term, consider developing a Canadian Super Sandbox

We are supportive of the creation of an Ontario Regulatory Sandbox at first instance, with a Canadian Super Sandbox over the longer term, and expect that their creation would help spur innovative start-ups and entrepreneurs to grow and raise capital. In our experience, many technology applications being developed by start-ups propose to offer consumers access to products and services that may be regulated under securities laws, financial services regulation (e.g. consumer protection, money transmission, deposit-taking/custody, lending, insurance, etc.) and anti-money laundering/anti-terrorist financing and economic sanctions laws. Entrepreneurs can be overwhelmed by the myriad regulatory regimes that may apply to their proposed businesses and challenged by the potential time and costs associated with initial registration and ongoing compliance.

For a fintech start-up with a business model that intersects with one or more regulatory frameworks, it is difficult to provide potential investors with an accurate budget and timeline for obtaining the approvals required to commence business. In our experience, the OSC Launchpad provides timely and flexible guidance to start-ups, which allows them to communicate their proposed path to registration and compliance with prospective investors and determine what additional personnel and resources may be required to achieve their objectives. An Ontario Regulatory Sandbox which could also provide support with respect to other financial services regulatory frameworks would be a welcome enhancement to this experience.

At the same time, a significant challenge to launching a regulated fintech business in Canada continues to be the lack of harmonization among provincial securities regulatory authorities and other financial services regulators in certain key areas. For example, various securities regulatory authorities within the CSA Regulatory Sandbox take different approaches when applying their securities regulation to a new business model. Securities regulatory authorities can disagree about whether a particular financial product is a security, a derivative or a hybrid and whether a particular activity would trigger the requirement to be recognized as a marketplace or clearing agency in their province. As a result, a start-up can find itself, directly or indirectly, negotiating separate terms or orders with various CSA members within the CSA Regulatory Sandbox which can be prohibitively costly and time-consuming.

We expect that a similar experience may occur in a Canadian Super Sandbox with respect to provincially regulated financial services sectors, such as the insurance industry, trust companies and credit unions, mortgage brokers and administrators, financial planners and money services businesses.

As many fintech start-ups propose to offer their products and services online through websites and mobile applications, the geographical boundaries of provinces and territories have little relevance to their prospective Canadian customers. Some start-ups require a critical mass of users in order to determine the viability of their business model and would benefit significantly from being able to attract users across the country from the time of their initial launch. The costs of registering and complying with multiple provincial and territorial regulatory frameworks is often the primary barrier that prevents start-ups from launching across the country. In some cases, a fintech business will not to offer its application to users in smaller jurisdictions where such costs are not justified based on the size of the market.

For a Canadian Super Sandbox to be truly effective in applying lighter touch regulation to foster innovation, we believe that all participating jurisdictions should defer to the regulator in the start-up's principal jurisdiction to establish terms and conditions of registration during the "sandbox" period, which is typically 24 months. Investor and consumer protection risks of this approach could be managed by limiting the total amount of activity that a start-up could conduct in non-principal jurisdictions during the sandbox period. For example, the Canadian Super Sandbox could agree on a threshold number of clients, individual and/or aggregate transaction and account values, that a start-up would be permitted to have in non-principal jurisdictions. A start-up that stays below these thresholds during the sandbox period would be exempt from registration in the non-principal jurisdiction or subject to a light, uniform registration regime that requires extra-provincial registration and the appointment of a local agent for service. This approach would allow a start-up to test its busines model across the country while subject to regulatory oversight in its principal jurisdiction only. The Canadian Super Sandbox would share business models and data collected from each regulated start-up, which a view to achieving a harmonized approach to regulation over time.

We expect that Ontario would play a leadership role in establishing the Canadian Super Sandbox and would therefore need to embody the commitment to defer to other provincial and territorial regulators to regulate start-ups based in their local jurisdiction. We note that the OSC did not take this approach with the adoption of the Passport System. However, considerable time has passed and harmonization efforts have generally taken hold, so we believe it to be an opportune time to assess a cooperative approach to issuer regulation across the country. In this sense, the Canadian Super Sandbox could also be a sandbox for regulatory cooperation without exposing investors and consumers in their jurisdictions to material risk. In our view, the 24-month time limitation, reporting requirements and other terms and conditions which typically accompany sandbox exemptive relief should address the OSC's investor protection concerns in this regard.

Finally, we would expect that certain federal regulatory authorities would want to participate in the Canadian Super Sandbox, which would be different from the CSA

experience. A cooperative regulatory approach between provincial and federally regulated bodies would require considerable study and consultation.

32. Requirement for market participants to provide open data

We express no comment on the merits of open data. Any approach to regulation of open data should be the subject of additional consultation and consideration. To the extent that the province and/or the OSC consider the regulation of open data, any such regulatory framework should be developed in collaboration with industry and other governmental and regulatory bodies (including the Federal Department of Finance and the Advisory Committee on Open Banking, the Department of Innovation, Science and Economic Development Canada, the Privacy Commissioner of Canada and the Canadian Commissioner of Competition) to avoid inconsistency, duplication and regulatory compliance cost and burdens resulting from multiple and overlapping regulation.

33. Allow for greater access to capital for start-ups and entrepreneurs

While we are supportive of finding ways to facilitate access to capital for start-ups and entrepreneurs, the appropriate path to doing so requires careful thought and consideration. In our view, the business trigger for dealer registration is an effective tool for determining when an angel group ought to be registered as an EMD under securities laws. The regulatory requirements applicable to EMDs provide protections which should benefit angel investors and the issuers that they finance when participating in these groups. The fact that a group is "not-for-profit" would generally support the position that it is not trading in securities "for a business purpose" and therefore should not be required to register as a dealer. However, this factor alone should not be determinative, as not-for-profit organizations typically have a paid staff, angel investors may rely on their recommendations and conflicts of interest may arise. Rather than legislatively changing the registration requirements, the CSA could publish terms and conditions that would apply to an angel investor group that proposes to register as an EMD or restricted dealer based on precedents that already exist across the country (including P2P lending platforms). Such terms and conditions could include sandbox relief from capital, insurance audit requirements for a start-up angel group for the first two years of its operations.

In addition, the CSA should adopt a flexible approach when evaluating individual registration applications for all positions, including dealing representatives, to recognize the valuable experiences of angel investors outside of the financial services sector. This proposal is an extension of recent CSA published guidance which indicates that non-traditional experience will be considered when evaluating the proficiency of Chief Compliance Officer candidates. In our view, relaxing these requirements will make it more feasible for angel groups to register as EMDs, which should be required when a group is operating for a business purpose.

Modernizing Enforcement

34. Consider automatically reciprocating the non-financial elements of orders and settlements from other Canadian securities regulators and granting the OSC a streamlined power to make reciprocation orders in response to criminal court, foreign regulator, SRO, and exchange orders

While we generally support the streamlining of recognition of orders made outside of Ontario, we oppose a regime that allows automatic reciprocity of both financial and non-financial elements of orders and settlements from other Canadian securities regulators without giving affected parties an opportunity to respond. Unless the affected party had already addressed reciprocity at the initial proceeding, an automatic recognition would undermine a respondent's right to due process, since the respondent would no longer have the opportunity to address whether, and to what extent, the order or settlement should apply in Ontario. For example, an order or settlement that was negotiated with another Canadian securities regulator may be the result of unique considerations specific to that jurisdiction, that are not necessarily applicable in Ontario. Staff should be required to demonstrate why a particular order or settlement should apply in Ontario, with a right to respond provided to the affected party.

Our view is that the proposal to automatically reciprocate orders made by criminal courts, foreign regulators, self-regulatory organizations and exchanges is particularly problematic. Significant concerns arise in respect of whether the OSC has jurisdiction to make specific orders that are made by other authorities and regulators, and whether those orders should apply in Ontario, For example, there may be widely different evidentiary considerations that apply before the other regulators. It is also unclear whether the OSC requires an automatic reciprocation process in respect of such orders for the efficient functioning of Ontario's capital markets.

An alternate option is to introduce a process similar to that of the Chartered Professional Accountants of Ontario, whereby a conviction by another regulator or by a criminal court creates a rebuttable presumption that there has been professional misconduct. This results in an expedited process for sanctioning the respondent, while still providing the respondent an opportunity to respond. There could be a rebuttable presumption that the same sanction should be imposed (unless it is outside the power of the OSC to impose, such as a jail sentence).

The process need not be cumbersome, costly or time consuming. Rule 11(3) of the OSC Rules of Procedure and Forms already provides a streamlined process for reciprocating orders under s. 127(10) of the Act. The rule strikes the appropriate balance by providing OSC Staff with the option to expedite inter-jurisdictional enforcement proceedings, while still respecting the respondent's right to due process and requiring Staff to establish why

an order would be in the public interest in Ontario. Given the scope of s. 127(10), the current procedure made available by rule 11(3) allows Staff to respond to orders made by the courts and foreign regulatory authorities, in addition to those made by other Canadian regulators.

35. Improve the OSC's collection of monetary sanctions

The Taskforce proposes giving the OSC more effective powers to freeze, seize or otherwise preserve property, including property transferred to family members or third parties below fair market value.

While we agree that Staff should have effective powers to enforce its orders, the parameters of the proposed expanded power to freeze assets, as articulated, appear unnecessarily broad and far-reaching. Like in other legitimate situations demanding similar responses, the ability of Staff to freeze and seize assets in the hands of third parties should only be available in exceptional circumstances, where the OSC is able to meet the most stringent of tests, such as the test for a Mareva injunction. Having the right to a hearing to revoke or vary an order is not a sufficient safeguard, particularly where the OSC seeks to seize property in the hands of minor children or individuals who have no connection with the alleged conduct and no ability or resources to retain counsel.

If an enhanced power to seize or freeze is established, it should be used to benefit all unsecured creditors fairly. A monetary sanction creates an unsecured right in the assets of those to whom the sanction is directed. Despite the concern that too many sanctioned parties do not ultimately pay their debts, the state should not create a priority for a regulator. Accordingly, despite any power to seize, any proceeds from such seizure should be allocated in accordance with a pro rata distribution amongst all unsecured creditors of the sanctioned party.

We are concerned with any proposal that would permit the disposal of frozen property prior to a hearing or prior to an order being made. This would prejudge the matter and undermine a party's right to a fair hearing. There is little advantage to disposing of such assets prematurely unless it can be established that creditors will be prejudiced unless prompt action is taken. If the party is truly insolvent, and if the assets are to be held for the benefit of all unsecured creditors (not just for the benefit of the regulator), then the prejudice is diminished, or at least significantly reduced. This is another reason why the proposed amendment should not create a super priority for the OSC when exercised.

The Taskforce proposes limiting access to drivers' licences and licence plates for monetary sanctions owing to the OSC.

We support processes that enhance the ability of the OSC to address smaller enforcement matters efficiently, while preserving the rights of alleged wrong-doers and not diverting Staff's resources from other more significant matters. Withholding drivers' licenses, or other Ontario services, until regulatory fines are satisfied may be appropriate in certain circumstances.

36. Create a prohibition to effectively deter and prosecute misleading or untrue statements about public companies and attempts to make such statements

We agree that the OSC should make it a priority to deter all forms of market manipulation, including the deliberate practice of making misleading or untrue statements about public companies in an effort to "short and distort" or "pump and dump".

We also recognize the difficulties that regulators have had in securing findings of contravention under securities laws for making "untrue statements".

However, caution should be exercised before enacting any new statutory prohibition. The OSC should not inappropriately deter the practice of short selling or negatively impede legitimate and truthful market analysis or reporting. Also, any new statutory prohibition should not stifle free speech, including opinion. Further, caution should be exercised not to unduly interfere with the potential benefits of short selling. These include the promotion of capital formation, hedging the risk of an economic long position in the same security, uncovering issuer fraud, and contributing to price efficiency.

In any event, it is unclear why a new statutory prohibition is required. There are existing federal civil and criminal prohibitions on making false and misleading statements to the public to promote a business interest under the Competition Act, and the Taskforce has not identified any deficiencies in the Competition Bureau's enforcement. Moreover, the Taskforce has not identified how the new prohibition would operate given the duplication and overlap with the Competition Bureau's existing jurisdiction. In addition, existing securities laws appear to be effective, together with private civil law remedies. OSC Staff already have the powers in s. 126(1) and (2) of the Act in its enforcement toolkit and consideration should be given to how that provision could be clarified to better align itself with the conduct in question, together with guidance which can assist market participants in understanding the regulator's expectation of what constitutes manipulative activity versus legitimately employed short selling activity.

If a specific statutory prohibition is introduced, it needs to include appropriate safeguards. These should clarify, among other things, that:

- the prohibition should be limited to statements that are false or misleading in a material respect, similar to existing federal law;
- the prohibition should permit statements of opinion;
- a due diligence defence should be included, which can exculpate an accused if the accused can demonstrate that the statements were made after making reasonable inquiries and conducting reasonable research that supported the veracity of the underlying statements;
- there should be other defences to protect a third party publishers, such as internet providers or members of the media that is simply publish or post a statement; and
- mitigating factors should be included, such as disclosure of one's position in the stock (e.g., clearly disclose that they are shorting the stock).

37. Increase the maximum for administrative monetary penalties to $5 million

We disagree with the premise that the OSC does not have sufficient sanctioning powers, and that current available sanctions are not sufficient deterrence for wrongdoing. While paying sanctions imposed should not be treated as amongst the cost of doing business, raising the maximum administrative penalty to $5 million does not accomplish that end. The OSC already has the power to impose sanctions that are commensurate with the wrongdoing, including forcing companies to disgorge amounts obtained through breaches of securities law and to pay the costs of an investigation. Given that the OSC so rarely imposes fines that are at or approach the existing cap, raising the cap to $5 million is unnecessary. In addition, where the OSC takes action against a market participant civil litigation by affected parties can and often does follow. It is unnecessary to layer a more punitive monetary penalty on top of the OSC's existing powers and the ability of affected parties to seek redress through the courts.

The law is clear that the role of a capital markets tribunal in Canada is administrative and should be exercised in furtherance of protecting investors from fraud and wrongdoing, as well as instilling confidence in the strength, honesty integrity and sustainability of our capital markets. Courts have recognized that sanctions should not be penal, *per se*, but should be directed towards specific and general deterrence that furthers the OSC's regulatory and administrative goals. Raising the amount to $5 million also creates a serious risk that the administrative penalty carries "true penal consequences", which raises constitutional and Charter issues, and may, in fact, unlawfully alter the OSC's mission beyond its legitimate mandate.

In practical terms, the OSC should be focused on removing bad actors from the capital markets entirely and sanctioning responsible market actors in a way that impresses upon them the seriousness of their conduct, without artificially or unnecessarily constraining their ability to carry on business once punishment has been meted out. Responsible market actors are, in our experience, much more worried about the prospect of negative publicity, officer/director bans and the revocation of their registrations than they are about the prospect of a monetary penalty. It is more important that the OSC act diligently to remove the ability of bad market actors to participate in the market than it is to impose monetary sanctions that are often uncollectible.

38. Strengthen investigative tools by empowering OSC Staff to obtain production orders and enhancing compulsion powers

We are not aware of any empirical evidence that the OSC's current investigative and compulsion powers are deficient. It has been our experience that OSC investigators have ample powers to obtain documents and information from market participants, whether they are the subject of the investigation or not.

The Taskforce has raised a specific issue in relation to obtaining access to documents housed in the "cloud". The OSC already has ample powers to obtain digital content that are in the possession or control of market participants. However, the Taskforce appears to be contemplating new powers to seize digital content that is hosted by third parties in the "cloud" through the issuance of a legal process against such parties. However, most cloud services are operated by foreign parties on servers outside Canada. There is considerable doubt that the OSC has the power to seize such information outside Canada outside of existing mutual legal assistance treaties and other memoranda of understanding with foreign securities regulators. While the Government of Canada is currently in negotiations with the United States to reach an executive agreement with the United States under the Cloud Act that would permit law enforcement officials to obtain access to digital or "cloud" content based in the United States, no such agreement has been reached to date. As such, the adoption of a new OSC power to compel the production of digital content from the "cloud" would arguably circumvent existing treaty instruments and might even impair ongoing treaty negotiations between Canada and the United States. Moreover, the introduction of such powers could invite the issuance of a reciprocal legal process by foreign states and regulators that are directed at compelling the production of data relating to Canadians that are held by data providers or cloud services based in Canada. Above and beyond these serious jurisdictional concerns, the introduction of these new powers would raise a number of privacy and other legal concerns which require careful, cases-by-case analysis.

We also do not agree with the recommendation that the OSC should have the power to compel parties to "find and gather" and "prepare and produce" documents "in the form and

within the timeframe requested by the investigator". Under the existing production order powers under the Criminal Code, law enforcement officials in Canada have no ability to compel a third party to "prepare" documents, and the Taskforce's recommendation would exceed the power of law enforcement to investigate criminal offences. In addition, gathering and producing documents and preparing information for witness interviews is already very costly and time intensive for respondents. Requiring parties to also "prepare" new documents with an imposed deadline is potentially overly burdensome.

"Data delivery standards" should not be imposed unilaterally but should be developed in consultation with the legal community and should allow for flexibility. Rigid protocols requiring production of records in a particular format can impose an unnecessary financial burden on a responding party, particularly where alternative methods of production are more efficient and can achieve the same outcome.

We are also concerned by the suggestion that the powers available to administrative investigators should be aligned with those available to criminal investigators. This raises obvious fairness and due process issues since the subjects of administrative investigations do not have the full protection of the Charter. Moreover, to obtain a production order under the Criminal Code, a criminal investigator is required to obtain advance approval from a court. Based on the Taskforce's consultation paper, the Taskforce is contemplating powers that even exceed existing law enforcement powers for the most serious crimes under the Criminal Code.

Any enhancements made to production order powers must also consider, and protect against, the acquired information being unfairly used against the respondent in other proceedings and jurisdictions. If a party is compelled by the OSC to produce self-incriminating documents, then additional safeguards should be put in place to prevent those documents from being used in other proceedings or provided to other regulators or criminal authorities of another jurisdiction.

39. Greater rights for persons or companies directly affected by an OSC investigation or examination

We strongly agree that there should be more transparency surrounding the OSC's investigations and examinations, together with a mechanism to resolve disagreements efficiently and fairly. This could be achieved through legislative amendment to section 11 and/or section 17 of the Act and the Rules of Practice, or otherwise through practice and procedures.

We offer the following specific comments:

- A recipient of an OSC Request for Information or summons should be able to seek clarification or directions from an adjudicator or designated official in respect of an

information request. The current process is not transparent and lacks a formal framework to seek clarification or further information. There is no process to make such requests for clarification or direction. Making such an opportunity and process available will facilitate responses that better assist the OSC in its inquiries or investigation.

- Staff should be encouraged to provide prompt notice when an investigation has concluded. In the absence of doing so, the recipient has no certainty about whether its activities remain the subject of regulatory concern. Such certainty would assist capital market participants in complying with securities laws, in that they can adopt and apply any OSC guidance or continue with a process that the OSC has concluded complies with securities laws with certainty. In addition, the existence of and certainty surrounding open investigations can be an impediment to capital markets activity as customary due diligence includes questions about whether there are matters under investigation.

- Staff, where practical, should provide documents in advance of an examination to persons served with a summons to attend an oral examination to facilitate the examination. This enables the individual to become familiar with the documents so as to provide better informed answers and assists counsel in being able to prepare the witness (which not only respects the individual's due process rights but can also facilitate answers that are more well-informed). In many cases, Staff seek detailed, historical information from witnesses, which they are unable to recall without reference to documents and communications from that time period. Providing documents to witnesses in advance is a practice that occurs in other jurisdictions and reflects a more fair and efficient process of information gathering, with no prejudice to the integrity of the investigation. As a public regulatory agency, there is little merit in a "gotcha" approach to enforcement, particularly where the objective is to prevent wrongdoing, encourage remediation and encourage a 'best practice' level of compliance.

- Where documents requested are voluminous and difficult and costly to obtain, organize and produce, Staff should provide an opportunity for persons and companies served with a summons to initially produce a subset of documents followed by a "meet and confer" session to refine the required production and timeline. As a further step, to the extent that the production will require electronic searching or production of large numbers of documents using document management tools, the meet and confer session should involve consideration of the steps that have been taken to produce relevant documents (which should be clearly set out by the producing party) as well as any comments on additional steps that may be taken having regard to proportionality considerations.

40. Address concerns regarding the OSC's use of contempt proceedings related to investigations and potential creation of offences for obstruction, including non-compliance with a summons

As set out above in response to proposal 39, we believe a mechanism is required within the OSC investigation process to facilitate the resolution of disputes regarding compliance with a particular summons. Our view is that a panel of Commissioners or the Tribunal, rather the courts, should provide some oversight of the pre-hearing enforcement process, including by addressing failure to comply with a summons, as well as providing guidance and direction sought by targets that may arise from time to time. Access to the Tribunal (or the Commissioners), or a designated member thereof, from time to time, for both Staff and affected parties, would enhance efficiencies and fairness associated with investigations. The Commissioner or Tribunal member who provides that function during the investigation process should not sit on the panel that considers the merits of the case.

The contempt proceedings under the Act should be used sparingly and in extraordinary circumstances and if in the context of a regulatory investigation, only after the process described above has been exhausted. If they are brought in the appropriate and limited instances, we do not think Staff should be required to obtain leave from a panel of Commissioners or the Tribunal before being allowed to initiate contempt proceedings. The Superior Court is capable of determining whether a contempt proceeding is meritorious, and if misused, costs can be imposed against Staff by the Court.

It is unclear why a new offence for obstruction or failure to comply with a summons is required or even desirable. A similar offence is already embodied in section 13 of the Act. Further, the concept of obstruction is fraught with risk and challenge: interpreted too broadly it could "chill" legitimate reliance on rights and liberties, such as the right to rely on good faith assertions of privilege and the right to allow counsel to properly represent the client. Any steps taken in this direction should ensure that appropriate safeguards are put in place, with offences appropriately defined against an objective standard. OSC Staff should be required to prove specific intent to obstruct.

41. Broaden the confidentiality exceptions available for disclosing an investigation and examination order or a summons

We support this recommendation. Complications often arise where a particular party, such as an employee, director or officer is directed to provide information or give evidence under an investigation order but is unable to speak freely with internal company advisors in order to be responsive to the requests. The current confidentiality restrictions also challenge those who need to self-identify when a conflict of interest arises in the course of responding or performing his or her duties. Accordingly, we view as appropriate, principled extensions the items proposed in items (c) and (d) of the Consultation Report (i.e., "any person where

the disclosure is necessary to comply with requests from OSC Staff or for sound corporate governance, such as the company's internal compliance and governance officers, and "the company's board of directors and senior management").

It should remain open to Staff to expand or limit such expanded disclosure (either in terms of the scope of the underlying disclosure, or the parties to whom disclosure is made) where the specifics of the investigation or examination require such limits. However, these limitations should be applied in a restrained and principled manner, such that the disclosure rights do not end up defaulting back to the current regime.

The reference to an "expanded list of counsel" is unclear. If the reference is to counsel for the party, they are already covered by the current regime. If it is to counsel to one of the expanded parties, they would similarly be covered by virtue of the above amendments.

Similarly, if and to the extent that it is necessary or appropriate to make disclosure to another regulator for the purposes of being responsive to the order, there seems to be minimum downside to permitting such disclosure. Presumably, any such disclosure would be on a confidential basis.

We note that the issues raised by this proposal could be appropriately addressed through the processes discussed under proposal 39 above.

42. Ensure proportionality for responses to OSC investigations

We strongly support this recommendation. This is a needed direction for the OSC's existing investigative regime and should be reflected in changes to existing policies and, if necessary, through legislative amendment. The burden placed on a responding party when requests for information are made can be significant, and frequently timeframes for responses are unfair and unrealistic. Staff's approach to enforcement would benefit from the inclusion of a proportionality standard as a practice that seeks to balance the regulatory requirements of the OSC, the significance of the particular investigation to the capital markets, and the burden imposed on the responding party.

In our view, the most effective way to facilitate such an approach is to enhance the level of transparency and communication between Staff and the investigation target as described above.

Where dialogue is insufficient or otherwise ineffective, there should ideally be a streamlined procedure for resolving "production disputes", whereby Staff and the responding party can seek direction from a neutral adjudicator in an expedited fashion (even in writing).

If a statutory amendment is not introduced, a guidance document should at least be published that outlines the guiding principles of proportionality and reasonableness in the capital markets context (similar to the Sedona principles that apply to the production of documents in civil litigation).

We note that the issues raised by this proposal could be appropriately addressed through the processes discussed under proposal 39 above

43. Clarify that requiring production of privileged documentation is not allowed

We support this recommendation. There is a longstanding practice of not seeking production of privileged documents. However, while section 13 of the Act reflects the principle in respect of compelled witness testimony, a statutory amendment clarifying that this equally applies to document production is desirable. We also suggest that it be clarified that any assertion of privilege by a party, even if challenged, should not in any way be interpreted as the party's unwillingness to cooperate and should not hinder any credit for cooperation.

44. Implement OSC procedural change to provide an invitation to discuss OSC Staff's proposed statement of allegations at least 3 weeks before initiating proceedings

As stated throughout our comments regarding modernizing enforcement, we are of the view that dialogue, transparency and reciprocal respect can increase the efficiency and likelihood of an outcome to an investigation that is in the public interest. This should reduce the tendency for parties to unduly entrench themselves within procedural positions. Once Staff prepares and presents its case to a potential respondent, the respondent should have an adequate and meaningful opportunity to consider the position and, where necessary, discuss the situation within the respondent's organization or with affected colleagues to form a response. Such a process takes time. The proposal to expand consultation by an additional minimum week (or more) is welcome and supported, however for a complex case the timeframe should be extended beyond three weeks to provide sufficient time for consideration of Staff's proposed allegations. Anything that would provide greater opportunity for thoughtful dialogue in a pressure-free context should be encouraged.

45. Promote prompt resolution of OSC enforcement matters by ensuring the confidentiality of dialogue between OSC Staff and parties under investigation, and protecting such investigated parties from liability for admissions made to the OSC in settlements and from liability for disclosing privacy protected information to the OSC in the context of an investigation

We are supportive of this proposal. The prospect of potential civil liability, particularly the threat of class actions, unquestionably hinders resolution with the OSC, and significant time and energy is devoted to the phrasing of "admissions" to mitigate this risk.

While class actions may well complement regulatory investigations to achieve investor redress and deterrence, the standards and objectives of such proceedings materially differ from those of the OSC. The civil regime has its own set of procedural protections that allows parties to obtain evidence without the need to "bootstrap" on regulatory settlements. Accordingly, the two regimes should be able to operate separately without compromising the integrity of one another.

In the civil context, settlements are almost invariably reached without the need for "admissions" (and typically include a disclaimer of any admissions). This same framework should conceptually be available in the context of regulatory settlements. While capital market participants would not have the benefit of express admissions, the fact of a settlement (and the sanctions imposed by that settlement) would provide ample market protection.

In the absence of a statutory protection against using admissions made in civil proceedings, parties are reluctant to engage with Staff until the issue of civil exposure is resolved. This unduly prolongs investigations, increases costs associated with them and related proceedings, and delays ultimate resolution. This result is not in the public interest.

We believe that there should be blanket protections from liability for compelled or voluntary disclosure of personal information or other disclosures in response to an investigative request or summons that may engage privacy interests. Disclosure to the OSC, a statutory regulator, should not be a source of potential liability under privacy statutes, and the risk of such liability needlessly hampers meaningful dialogue between the OSC and capital market participants. These protections may need to be coupled with additional protections against subsequent disclosure by the OSC under FIPPA and other privacy legislation, though the current regime likely provides sufficient protections in this regard.

Enhancing Investor Protection

46. Require that amounts collected by the OSC pursuant to disgorgement orders be deposited into court for distribution to harmed investors in cases where direct financial harm to investors is provable

Should amounts collected by the OSC pursuant to disgorgement orders be deposited into court for distribution to harmed investors in cases where direct financial harm to investors is provable?

We are supportive of requiring that disgorged amounts be distributed to harmed investors where possible. Amounts at issue could include monies determined to have been obtained by a party improperly at the expense of investors and ordered disgorged after a proceeding or as part of a settlement, including an agreement to repay such amounts voluntarily. We agree with the Taskforce's proposal that the distribution to investors should not include administrative penalties. If necessary, a statutory regime should be developed.

While one option is to have the amounts deposited into court as suggested, we do not believe it is the only way to achieve the goal of investor protection. For example, a dedicated fund could be established outside of court and administered by an independent third party pursuant to a Commission or Tribunal order. We do not believe that the Commission (or Tribunal, if and when established) should be charged with administering this process.

What process should be used to resolve disputed claims?

Regardless of whether the amounts are deposited into court or a dedicated, directed fund, the distribution process could resemble a CCAA or receivership claims process. The process could also resemble that taken with respect to distribution of proceeds in class action matters. For example:

- A designated party (an "**Administrator**") would call for claims, run a claims process and determine the appropriate means of distribution.

- If the investor loss is known, the Administrator would communicate directly with the investor regarding the amount of the claim and provide the investor an opportunity to object.

- If the investor loss is unknown, the Administrator would call for claims and harmed investors could submit claims with supporting information and documentation.

- The Administrator would be the initial arbiter of claims with a right to appeal a claims decision to the Superior Court or OSC Tribunal.

Consideration should be given to how to structure this regime so that it constitutes a "preferable procedure" to class actions in the appropriate cases, considering the Supreme Court's decision in AIC Limited v Fischer[8]. The Canadian jurisprudence suggests that the risk of a parallel class action can be reduced if the adopted OSC procedure is appropriately designed to provide those affected with procedural rights and an opportunity to achieve a fair result.

How should the OSC communicate information relating to potential distributions?

The Administrator should be required to provide a notice of distribution to investors. The form of this notice should be case specific. If the universe of harmed investors is known, a direct form of notice to the investors is likely appropriate. If the universe of harmed investors is unknown or incomplete, newspaper and online media notice may be appropriate.

What criteria should the OSC use to determine when a receiver would be appointed or what amounts are too small to distribute to investors?

Amounts available for distribution should be determined based on the establishment of articulated principles. Staff, in consultation with the Administrator, should apply the principles and use their discretion to determine when a distribution to investors is warranted (e.g., the appropriate monetary threshold), or whether judicial intervention is warranted, including the appointment of an Administrator. The outcome will depend on various factors, including the number of investors, the amount recovered, the anticipated cost of a "distribution" proceeding (including cost of the Administrator and the claims process) and the anticipated cost of distribution.

47. Give the power to designated dispute resolution services organizations, such as the Ombudsman for Banking Services and Investments (OBSI), to issue binding decisions ordering a registered firm to pay compensation to harmed investors, and increase the limit on OBSI's compensation recommendations

Similar to a number of the proposals, this proposal touches upon the role of a national organization whose jurisdiction extends beyond the borders of the interests of investors in Ontario. As such, any proposed changes to the mandate of OBSI, or any other dispute resolution body, should only be effected after broad consultation with other provincial jurisdictions and all affected stakeholders. The specific proposal, however, would

[8] [2013] 3 SCR 949

significantly alter the mandate of OBSI, and therefore if any such change to its authority is to be considered, its other functions, including playing a role as investigator and investor and consumer advocate, should correspondingly be reconsidered.

Additional Recommendations

Given the importance of the U.S. market and U.S. sources of capital, and the comparative regulatory benefits of both a reasonably harmonized policy framework and regulatory approach to policy interpretation, we believe that the Taskforce should consider a number of additional policy items in its recommendations that in some respects more closely align the Ontario capital markets with those of the United States. A number of these items have been discussed in response to specific recommendations set out above, however, for convenience we have set out several of the key items below.

- The impact of the JOBS Act on capital formation in the United States has been significant and Canadian securities regulation has lagged behind those reforms, which has created impediments to an effective and efficient capital market. The result has been to incent Canadian companies to consider (exclusively) going public in the United States and leaving Canadian investors with limited opportunity to participate. To address these differences, the Taskforce should consider:
    - more flexible financial statement requirements for initial public offerings, including clear application of rules relating to significant acquisitions (without the uncertainty of inconsistent application of rules relating to "primary business" financial statement requirements) and less burdensome MD&A requirements;
    - a more flexible approach to "testing the waters" meetings in advance of initial public offerings;
    - a mindset of policy interpretation and application that seeks to foster capital formation and assisting issuers in capital raising transactions, which has reduced what used to be a significant burden (e.g., clearing comments with the SEC) to a more streamlined approach that now means that it takes significantly longer to clear comments in Canada than it does with the SEC;
    - the adoption of a "well-known seasoned issuer" model that would allow seasoned issuers to clear a shelf prospectus with limited regulatory review.
- The Taskforce should consider the accelerated adoption of an "access equals delivery" model to, among other things, reduce burdens of printing.

- The Taskforce should consider further adoption of revisions to existing instruments and policies to "reduce the regulatory burden" and ensure harmonized policy application across the country, including, as examples:
  - adopting revisions where necessary to acknowledge that where an issuer is proposing to undertake a cross-border initial public offering and the issuer is expected to become an "SEC Issuer" that exemptive relief should not be required in order to rely on the provisions applicable to an "SEC Issuer", provided that the issuer ultimately becomes an "SEC Issuer";
  - clarifying the practices and interpretation of the CSA Staff Notice adopting a confidential prospectus filing regime that permits issuers to file a prospectus on a confidential basis, in particular regarding the level of completeness of the prospectus. In our view the OSC should allow issuers some flexibility with respect to a confidential filing (for example, allowing a pre-file that may not reflect all required financial statements, if those financial statements are in the process of being prepared and will be provided for review prior to any public filing).
- We believe that the Taskforce should recommend permitting distributions on a basis equivalent to Rule 144A in the U.S. to Qualified Institutional Buyers.
- The Taskforce should consider modernizing the exemptions for foreign take-over bids, issuer bids and rights offerings, particularly to eliminate "filing" requirements that add significant compliance costs for foreign issuers seeking to comply with the Ontario rules (as compared to many other countries, including the United States, that have "self-executing" exemptions, requiring no filings).

We believe that these changes would be helpful in supporting Ontario as a globally competitive and highly attractive market for investors and issuers.

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We thank the Taskforce for its efforts and encourage the Taskforce to consider wide-ranging oral consultations with a broad cross-section of key capital markets participants to provide those participants with a meaningful opportunity to participate prior to the Taskforce finalizing its recommendations.

We would be happy to discuss our comments with you.

For convenience, at first instance please contact James R. Brown (jbrown@osler.com or 416.862.6647) regarding any questions regarding our Firm's submissions.

Yours very truly,

Osler, Hoskin & Harcourt LLP