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September 7, 2020

By E-Mail

Attention:

Capital Markets Modernization Taskforce
CMM.Taskforce@ontario.ca

Dear Sirs/Mesdames:

Re: Consultation – Modernizing Ontario's Capital Markets

We are writing in response to the July 2020 Ontario Capital Markets Modernization Taskforce (the "**Taskforce**") Consultation Report (the "**Report**"). These comments are provided by the lawyers of Torys LLP who are signatories below, in their personal capacities, and not on behalf of the firm or any of its clients.

We are supportive of the Ontario Securities Commission's (the "**OSC**") Burden Reduction Task Force initiative to reduce the regulatory burden in Ontario's capital markets. Any amendments to Canadian securities laws recommended and/or implemented by the Taskforce should take into consideration the policy objectives set out by the OSC Burden Reduction Task Force.

Burden reduction cannot be successfully achieved if securities law amendments are adopted in Ontario only. Disharmony in securities laws across Canada is disruptive to the capital markets and will add to the regulatory burden; the only potential justification for such disharmony would be to address significant investor protection concerns that are unique to a local market. Otherwise, a uniform set of rules across Canada should be adopted.

Likewise, given the proximity, size and dominance of the United States market, limiting any Canadian misalignment with U.S. securities regulatory rules is important, both to facilitate cross-border capital raising and more generally to ensure Canadian capital markets remain competitive.

Finally, many of the Taskforce's proposals are bold and innovative, and raise important policy questions that merit further consideration. However, in order to provide meaningful feedback, market participants will benefit from more comprehensive and detailed analysis. In addition, a substantial transition period (at least one year) should be provided to enable market participants to prepare for implementation of new regulations.

With those overarching principles in mind, below are our comments on some of the proposals contained in the Report.

<u>Improving Regulatory Structure</u>

Proposal 2: Separate regulatory and adjudicative functions at the OSC

We support the proposal for a separate adjudicative tribunal, but only to deal with enforcement and registration proceedings where the concern about appearance of fairness is most acute. The creation of a separate tribunal to deal with such matters would foster greater transparency and would give respondents confidence that they are receiving a hearing that is procedurally fair and independent. In order to maximize the goal of independence, we recommend that the tribunal be entirely separate from the OSC, and that it report to the Minister of Finance. Increased independence makes tribunal member competence and fitness for the role even more important. Guidelines to achieve this goal, and to ensure that the tribunal is free from political pressures and influence, would be necessary.

We recommend that in any event, merger and acquisition, and corporate finance hearings continue to be dealt with by the Commission. These matters engage broad policy and public interest concerns where it is desirable that hearing adjudicators have a sophisticated understanding of the Commission's ongoing policy concerns and priorities to ensure that hearing decisions on such matters are aligned with the Commission's overall views on policy and the public interest.

As noted above, we recommend that the new adjudicative tribunal's jurisdiction include presiding over "opportunity to be heard" hearings with respect to the imposition of the kinds of registration terms and conditions currently set out in section 31 of the *Securities Act* (Ontario) (the "**Act**"). These types of hearings are more akin to enforcement proceedings given their direct impact on the registrant's rights and livelihood. We believe that the benefits of a separate tribunal for enforcement proceedings would apply with equal strength to these types of hearings.

<u>Regulation as a Competitive Advantage</u>

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

As noted by the Taskforce in its Report, the accredited investor prospectus exemption is the most widely-used exemption in Canadian capital markets, representing over 90.5% of capital raised under exempt trades in 2019. As a result, any amendments to the accredited investor rules must be undertaken cautiously and only after a thorough review of the policy implications and foreseeable market consequences of any change.

We are not aware of any broad-based concerns from market participants regarding the imposition of the four-month hold period for exempt trades to accredited investors (or other exempt trades subject to the restricted period). We also note that accredited investors are typically compensated for this constraint on liquidity through a higher discount on the purchase price for securities that are privately placed (and conversely, issuers may be incented to offer freely-tradeable securities under a prospectus in order to minimize such discount).

Eliminating the four-month hold period for securities that are privately placed to accredited investors would be a significant departure from long-standing Canadian securities laws and established market practice. If the hold period was eliminated, this could have broad market and policy implications, including:

(i) a significant reduction in prospectus offerings as many issuers may see no benefit to incurring the costs and rigour associated with a prospectus offering;

(ii) retail and other non-accredited investors having fewer opportunities to participate in offerings by issuers, with the result that non-accredited investors' access to the public markets will increasingly occur through exchange trades (or at-the market ("**ATM**") distributions) at current market prices or through investments in funds who have access to private placements;

(iii) increased misalignment with U.S. securities laws, where purchasers are subject to a six-month hold period when securities are privately placed by an issuer that has a reporting history of at least 90 days;

(iv) potentially higher concentrations of ownership (and influence) over issuers, and in the Canadian capital markets generally, by a smaller number of accredited investors with significant capital;

(v) increased risk of "back-door underwritings" (i.e. market participants using the accredited investor exemption to effect offerings to non-accredited investors without providing such investors with the protection of a prospectus (and the related increased regulatory resources that may be required to monitor this conduct and address any breaches));

(vi) fewer opportunities for underwriter participation in prospectus offerings and the market losing the discipline associated with the underwriters' due diligence process; and

(vii) fewer opportunities for regulatory oversight of issuer disclosure through the prospectus review process.

Before giving serious consideration to eliminating (or reducing) the four-month hold period for securities privately placed to accredited investors or under any other prospectus exemption, a comprehensive and data-driven analysis should be undertaken and published by the OSC on the market implications of such a change, including a comparison to equivalent hold periods imposed in other jurisdictions or similar regulatory amendments under consideration. While we are generally supportive of regulatory initiatives to reduce the regulatory burden while maintaining investor protection, Canadian capital markets should be aligned with best practices and securities trends globally.

To be coherent, any such analysis should also be accompanied by a review of the prospectus regime in its entirety. Rather than focus solely on the elimination of hold periods for securities that are privately placed with accredited investors, a more holistic review of the closed system should be undertaken, including whether the legal distinctions (and related rules) between securities sold in the primary and secondary market continue to be logical or necessary to enhance investor protection or other policy objectives. For instance, in light of the development of the civil liability regime for secondary market disclosure, once the seasoning period has lapsed, it may be appropriate for freely-tradeable securities to be issuable to any investor (accredited or otherwise) based solely on an issuer's continuous disclosure filings and without the necessity of having to file a prospectus. Recently adopted changes to the ATM distribution rules which dispense with the prospectus delivery requirement and the granting of statutory withdrawal and rescission rights further erode the distinction between primary and secondary market trading. We would welcome a regulatory study focused on the rationale and policy implications for differing regulatory

treatments of securities that are privately placed and those that are sold under a prospectus, and the related conditions and implications.

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

While we are generally supportive of burden-reduction initiatives, particularly for smaller issuers with more limited resources, this must be balanced with the need to provide investors with up-to-date and regular reporting. We are also mindful of concerns raised that quarterly reporting reinforces an emphasis on short-termism that is not always in the best interests of issuers and their stakeholders. As noted above, it is also important for Canadian capital markets to be generally aligned with best practices and securities trends globally.

While semi-annual reporting is permitted in the United Kingdom and Australia, we understand that the U.S. Securities and Exchange Commission (the "**SEC**") considered moving to semi-annual reporting and market participants were overwhelmingly against this change. Given the interconnectedness of the Canadian and U.S. capital markets and investor community, we believe any changes to permit semi-annual reporting must be made cautiously and only after extensive consultation with market participants on both sides of the border.

If semi-annual reporting were permitted only for some issuers, we struggle with the appropriate basis on which issuers would be deemed eligible to report on a semi-annual basis. The size of an issuer (by any measure) would not necessarily be an indicator of how variable the financial and operational results of its business may be, and in fact relatively small changes could be quite material for a smaller issuer. Allowing issuers with less significant quarterly financial and operational changes to report semi-annually may also be viewed as arbitrary since variability is not necessarily the basis on which investors make investment decisions – in fact, as our experience this year with the COVID-19 pandemic illustrates, maintaining the status quo in any given quarter may be quite material to investors. And, presumably, where there is less quarterly financial and operational variability, the burden of producing a quarterly report should also be less.

To decrease the administrative burden on smaller issuers, consideration could be given to streamlining Management's Discussion and Analysis ("**MD&A**") form requirements (as also suggested by the Taskforce in Proposal 10 below).

Proposal 7: Introduce an alternative offering model for reporting issuers

We are supportive of initiatives that would streamline the capital-raising process. However, this proposal should be considered as part of a more holistic analysis of the prospectus regime in its entirety (as noted in our response to Proposal 5 above). In our experience, most issuers regardless of size are able to efficiently raise capital under the current short-form prospectus model without incurring significant costs. Takedowns under shelf prospectuses can be completed quickly and at minimal cost, and recent amendments to the ATM distribution rules will allow more issuers to raise capital without having to comply with prospectus delivery requirements. Rather than create another prospectus exemption for this purpose, which will further serve to incrementally erode the distinction between the primary and secondary market, a more comprehensive and principled study should be undertaken.

Proposal 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

We support this proposal. More specifically, we support an expansion of current Canadian testing-the-waters rules to harmonize with recently liberalized U.S. testing-the-waters rules.

In particular:

- testing-the-waters communications with accredited investors should be permitted for any public offering (not limited to an initial public offering ("**IPO**")) for all companies regardless of size or type of issuer;

- an exception to the requirement to file "marketing materials" on the date of first use should be made for materials used in these expanded testing-the-waters communications; and

- the 15-day "cooling-off period" (after testing-the-waters is complete and before an IPO preliminary prospectus may be filed) should be reevaluated.

An expansion of the testing-the-waters rules will help reduce execution and reputational risk for issuers and their advisors.

Additionally, increased alignment between the Canadian and U.S. regimes will reduce regulatory friction for issuers in their cross-border financing plans, and ensure that the Canadian capital markets continue to be competitive with the U.S. For many cross-border public offerings, Canadian participation may not be necessary to meet the issuer's capital requirements and as a result, even relatively minor differences between Canadian and U.S. rules can sometimes result in issuers and their advisors determining not to proceed with a concurrent offering in Canada.

Finally, we would note that confidential communications with accredited investors about a proposed offering ("wall crossing") is a common practice for issuers that have an effective shelf prospectus on file. In such cases, if the issuer subsequently launches a public offering under its shelf prospectus, accredited investors that participated in the pre-launch confidential discussions may participate in the offering and purchase free-trading securities. For issuers without a shelf prospectus on file, such communications can only occur on a confidential basis with accredited investors on a prospectus-exempt basis and, in order to ensure compliance with pre-marketing restrictions, any subsequent sales of securities to such accredited investors (even if completed concurrently with an offering of securities under a prospectus) would be subject to a four-month hold period. Allowing all issuers to benefit from these confidential soft-sounding discussions with accredited investors would level the playing field for non-shelf issuers and avoid the imposition of hold periods based on whether an issuer does or does not have a shelf prospectus on file.

Do you think that the current prohibition on pre-marketing prospectus offerings continues to serve a useful purpose?

The prohibition on pre-marketing prospectus offerings is a cornerstone of the closed system on which Canadian securities laws are based. However, the distinction between primary and secondary market trading has eroded over time, including, as noted above, as a result of the development of a civil liability regime for secondary market disclosure and, more recently, amendments to the ATM distribution rules. While the pre-marketing prohibition creates an

important discipline on market participants to be sensitive about selective disclosure concerns and incents issuers to make prompt disclosure of all material information to the market, we are supportive of a comprehensive review of the prospectus regime and the rules that restrict pre-marketing.

If pre-marketing is expanded, should this be accomplished through a change to the prohibition generally or by introducing an exemption?

An expansion of, and amendments to, the existing IPO testing-the-waters exemption contained in National Instrument 41-101 – *General Prospectus Requirements* would be the most efficient way to liberalize Canadian testing-the-waters rules as described above.

Should conditions be attached to the ability to pre-market transactions more freely, such as: limits on the period that pre-marketing can be done, a requirement to enter into confidentiality and standstill agreements, limits on the number of potential investors that can be involved, or a requirement to reserve a portion of the offering for other investors? What other conditions should be applicable when companies choose to pre-market? Will this proposal result in less investment opportunities to retail investors?

We note that existing IPO testing-the-waters rules require that: (i) the issuer has a reasonable expectation of filing a preliminary prospectus in at least one jurisdiction in Canada; (ii) an investment dealer makes the solicitation on behalf of the issuer and the issuer authorized it to do so; (iii) the solicitation is made to an accredited investor; and (iv) the information about the proposed offering is kept confidential until generally disclosed or the issuer confirms in writing that it will not be proceeding with the offering. It would be appropriate to impose these same conditions for testing-the-waters communications in respect of any public offering.

As noted above, the current 15-day cooling off period, which is in conflict with the equivalent U.S. testing-the-waters rules, should be reevaluated.

We understand that there are sufficient market drivers that result in portions of a public offering effectively being “reserved” for retail and other non-accredited investors, and think that setting a minimum threshold for this purpose would be arbitrary and impractical to enforce. We are also not aware of any data to suggest that testing-the-waters communications on a Canadian IPO has resulted in exclusion of retail and other non-accredited investors. Before creating a condition of this nature, it would be appropriate for the OSC to collect data to understand the breakdown between accredited and non-accredited investor participation in public offerings where testing the waters communications have been held.

Do you have any concerns about increased insider trading or tipping as a result of increased pre-marketing? If so, what steps should be taken to deter such conduct?

Our experience is that there is an established market practice with institutional accredited investors for both IPO testing-the-waters communications and non-IPO wall-crossing communications to ensure both the preservation of confidentiality and the prompt disclosure of material non-public information. Issuers and their advisors are also incented to ensure that such communications occur on a confidential basis as a leak could result in a run-up in the stock price and prejudice a subsequent offering. However, we acknowledge that an expansion of the testing-the-waters rules could result in an increased risk of insider trading. To deter such conduct, it will

be important for regulators to actively monitor any unusual trading activity and address any breaches.

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

We support proposals to modernize the rules regarding delivery of documents and enhance reliance on electronic delivery.

We note that the voluntary notice and access system established in 2013 under amendments to National Instrument 54-101 – *Communication with Beneficial Owners of Securities of a Reporting Issuer* and National Instrument 51-102 – *Continuous Disclosure Obligations* ("**51-102**") has been widely used. With the guiding goals of burden reduction and harmonization, we would encourage the development of rules regarding electronic delivery that are, to the extent possible, consistent regardless of the type of document being delivered electronically.

Please provide feedback regarding which of the above communication and regulatory documents (and suggestions for others) should be made available electronically rather than delivered.

An access equals delivery model can be effectively used for all filings requiring delivery. However, given these will be new rules that the market will need to adapt to, we are not opposed to a phased-in approach starting with financial statements, MD&A and prospectuses. However, an access equals delivery model can easily (and should eventually) be extended to apply to all other documents requiring delivery, including those requiring action on the part of shareholders such as rights offering materials, proxy-related materials, takeover bid and issuer bid materials. Investors (and their advisors who often make or facilitate investment decisions on behalf of their clients) are generally comfortable with receiving, reviewing and responding to electronic communications.

How should shareholders be kept informed of these documents (i.e., one-time verification that shareholders will continuously monitor a company's website notifying electronic delivery of communication documents)?

We are generally supportive of the access equals delivery model proposed by the Canadian Securities Administrators ("**CSA**") in its Consultation Paper 51-405 – *Consideration of an Access Equals Delivery Model for Non-Investment Fund Issuers*. More specifically, we agree with the CSA's proposal to allow an issuer to satisfy its delivery obligations once it has: (i) filed the document on System for Electronic Document Analysis and Retrieval ("**SEDAR**"), and (ii) filed a news release (filed on SEDAR and posted on its website) indicating that the document is available electronically on SEDAR and that a paper copy can be obtained from the issuer on request. This approach should work seamlessly for annual and quarterly filings since it is standard market practice for issuers to issue a press release when those filings are made. While the issuance of a press release in connection with a prospectus offering is also customary, the timing of the release may vary depending on the issuer's particular disclosure practices and on the type of offering (i.e., a bought-deal, a marketed offering or an IPO). The access equals delivery rules should be sufficiently flexible to accommodate these differences in timing. With respect to the additional requirement for an issuer to file the document on its website, if this requirement is maintained, in recognition of modern technology where hyperlinks on websites are commonly used, we would

suggest clarifying that this requirement can be satisfied either by posting the document or posting a link that re-directs the viewer to SEDAR or elsewhere where the document can be accessed.

In what time frame should this transition to the access equals delivery model occur, e.g., six months after the publishing of the Taskforce's final report?

The time frame for the transition to the access equals delivery model should be informed by discussions with issuers and intermediaries, who are better placed to comment on how quickly such a model could be adopted.

Proposal 10: Consolidating reporting and regulatory requirements

We generally support initiatives to streamline duplicative reporting requirements and eliminate unnecessary costs and resources borne by issuers and shareholders. However, we are not aware of any significant overlap in the form requirements for an Annual Information Form ("**AIF**") and MD&A. We do not object to amendments that would combine the AIF and annual MD&A form requirements if there is strong support from the issuer community and investors to move to a single, consolidated filing; in general, we do not have a strong view regarding the particular format that is used to disclose information. However, it is important to maintain consistency in both the required content and form of reporting for all reporting issuers in order to facilitate comparison of peer disclosure and so that investors and other stakeholders know where to look for particular information. In addition, implementation of this proposal should be done in conjunction with the proposed adoption of an access equals delivery model so that the result is not an increase in the mailings to shareholders.

We note the recent announcement (August 2020) by the CSA that it has adopted amendments to NI 51-102 that narrow the circumstances under which reporting issuers are required to prepare and file Business Acquisition Reports. These amendments are in line with the Taskforce's proposal to simplify the content of Business Acquisition Reports and revise the significance tests so that Business Acquisition Report requirements apply to fewer significant acquisitions. As a result, we do not have any additional views at this time and would recommend monitoring the new amendments to see whether they have the desired effect.

Proposal 12: Develop a Well-Known Seasoned Issuer Model

We support the adoption of a well-known seasoned issuer model ("**WKSI**") model for Canadian capital markets similar to the model adopted in the U.S. A WKSI model will result in more efficient capital-raising and increased alignment between Canadian and U.S. securities laws, ensuring Canadian capital markets remain competitive with the U.S. A WKSI model will also free up Canadian securities regulators to devote more resources to other higher-value activities.

Similar to the U.S., WKSI eligibility should be made available to seasoned reporting issuers of a sufficient size. Accordingly, we would propose that a reporting issuer in Canada should meet the following requirements in order to be WKSI-eligible: (i) the issuer should be short-form eligible; (ii) the issuer should have a minimum public reporting history (similar to the U.S, we suggest a 12-month period would be reasonable), (iii) the issuer should be listed on a short-form eligible exchange and not be under de-listing review, and (iv) the issuer should not be noted in default of its reporting obligations by any Canadian securities regulator. Similar to the U.S., it would also be appropriate for the regulators to have discretion to exclude other types of issuers from WKSI-eligibility such as issuers in certain emerging markets, SPACs, penny stock issuers or issuers that have had a petition under bankruptcy filed by or against them within a specified period of time.

While we do not have a view on the appropriate minimum public float for a Canadian WKSI, the U.S.$700 million public float requirement for WKSIs in the U.S. should be reduced in recognition of the size of the Canadian market and its issuer base. Consideration should also be given to setting a threshold based on the dual requirements of market capitalization and public float.

In order to ensure that cross-listed Canadian reporting issuers are able to benefit from the adoption of an automatically effective shelf prospectus model, it will be important to ensure that Multijurisdictional Disclosure System ("**MJDS**")-eligibility is not adversely impacted by any new WKSI rules. For instance, a Canadian WKSI model would be of limited value to a cross-listed MJDS-eligible issuer if its introduction were to result in SEC review of the issuer's U.S. registration statement. In order to provide MJDS-eligible reporting issuers and their advisors with certainty on this point, we would encourage the OSC to consult with the SEC and ensure that the SEC perspective on MJDS-eligibility is published as part of any proposed WKSI rules.

Consistent with U.S. rules, we also support amendments to the base shelf prospectus rules more generally to permit base shelf prospectuses to remain effective for a period of three years (instead of the current 25-month period). This would allow cross-listed issuers to more efficiently file and renew Canadian and U.S. shelf prospectuses in unison.

Proposal 14: Introduce additional Accredited Investor (AI) categories

We are not aware of broad-based concerns from market participants regarding the unavailability of the accredited investor prospectus exemption. We also note that the accredited investor definition does currently include at least two categories that are implicitly based on proficiency, namely (i) an individual registered under the securities legislation of a jurisdiction of Canada as a representative of a registered advisor or dealer, and (ii) an individual formerly registered under the securities legislation of a jurisdiction of Canada (excluding limited market dealer representatives).

While we acknowledge that proficiency-based criteria may provide greater investment opportunities for individuals who may have the ability to adequately quantify the risk of potential investments, proficiency-based criteria alone would not be an indicator that an individual has the ability to withstand financial loss. In addition, we expect there may be greater challenges for issuers and registered advisors to independently diligence whether an individual meets particular proficiency-based criteria.

We are aware that the SEC has recently expanded the definition of an accredited investor to include, among others, persons with certain professional certifications, including FINRA licenses, certain family offices with at least US$5 million in assets and an expansion of the joint income/assets test to include "spousal equivalents". Canadian accredited investor rules are already flexible enough to accommodate substantially all of the categories covered by the expansion of the U.S. rules, and, absent widespread concerns that the accredited investor definition is currently too narrow, we do not believe an expansion of the Canadian rules is necessary or would be prudent.

Proposal 15: Expediting the SEDAR+ project

We fully support this proposal. Below are some areas for improvement that could be implemented in SEDAR+:

- Eliminate the code verification required to access documents on SEDAR.

- Consider enhancements that would permit searches to be conducted of all documents posted on SEDAR.

- Link SEDAR and SEDI filings so that filings across both databases for a particular issuer can be accessed through a single page.

- Generally, SEDI is not an intuitive or user-friendly application and requires a significant overhaul.

- Alert filers when comment letters and receipts have been posted, projects have been cleared for filing and applications have been accepted.

- Allow filers to select whether a document filed using the "Continuous Disclosure – Other" filing category should be "public" or "private". Currently, filers must email the securities commissions requesting them to change the status of the document.

- Retain the filer's contact details when logging onto the portal to avoid repeatedly inputting this information.

- Generally, SEDAR has not kept up with changes in the investment fund industry and certain filings for investment funds are extremely time consuming:

  - Filing fees must be posted per fund per jurisdiction. If a simplified prospectus qualifies the securities of 60 investment funds, that results in almost 800 separate fee entries on a screen that cannot be manipulated to the comfort of the filer.

  - Although investment funds can be consolidated under an investment fund "group" and included on a single simplified prospectus, each fund is considered a distinct reporting issuer under Canadian securities legislation. When filing semi-annual and annual financial statements and management reports of fund performance ("**MRFPs**"), two separate SEDAR projects must be created for each fund, one for the financial statements and the other for the MRFPs. This means that filing semi-annual or annual financial statements and MRFPs for an investment fund group of 60 investment funds would result in the creation of 120 SEDAR projects.

  - The filing process for financial statements of investment funds should be streamlined, in recognition of the fact that it is industry practice to file financial statements separately for each fund (rather than bundling).

  - The options for creating a SEDAR profile for an investment fund, especially the investment fund type, should be updated to reflect current trends in the industry.

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.

As noted by the Taskforce, tied selling is already restricted under the *Bank Act* and under National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("**NI 31-103**"). The Companion Policy to NI 31-103 ("**CP**") states that the tied selling restrictions prohibit an individual or firm from engaging in "abusive sales practices". The CP provides examples of abusive sales practices such as selling a security on the condition that the client purchase another product or service from the registrant or one of its affiliates, or a financial institution agreeing to lend money to a client only if the client acquired securities of mutual funds sponsored by the financial institution. The CP goes on to say that the tied selling restrictions are not intended to prohibit relationship pricing or other beneficial selling arrangements similar to relationship pricing. The tied selling restrictions are, therefore, designed to address coercive or abusive sales practices. Additional factual support and analysis should be undertaken before concluding that exclusivity arrangements, which are commonly negotiated and entered into between issuers and their lenders or financial advisors, are appropriately characterized as an abusive sales practice of the kind that is meant to be captured by tied selling rules. In addition, we note that the policy objective raised by the Taskforce in this proposal, namely to regulate practices that may be considered to impede competition within the dealer community, is different from the policy objectives behind the tied selling rules.

The Taskforce also proposes that a lender be considered a "connected issuer" for a specified firm registrant. This would mean that, under National Instrument 33-105, an independent underwriter would be required.

Currently, the Companion Policy to National Instrument 33-105 – *Underwriting Conflicts* ("**NI 33-105**") states that the mere existence of a debtor/creditor relationship between the issuer and the specified firm registrant does not necessarily give rise to a connected issuer relationship. In practice, many issuers routinely include connected issuer disclosure in their prospectuses when they have lenders that are affiliated with underwriters of their offering, particularly when the proceeds from the offering may be used to repay indebtedness. Therefore, an amendment to NI 33-105 that deems an issuer to be a connected issuer of an affiliate of its lenders would not result in any meaningful change in an issuer's prospectus disclosure. We also note that the existence of a connected issuer relationship does not give rise to an independent underwriter requirement. An independent underwriter is only required under Section 2.1(3) of NI 33-105 if the issuer or selling securityholder is a related issuer of the underwriter.

Given that many issuers in Canada have lending relationships with affiliates of one or more of their underwriters, many of the proposals suggested by the Taskforce -- requiring the participation of an independent underwriter in every offering where the issuer is a connected issuer of an underwriter, mandating a specific percentage of all underwritings be comprised of non-bank owned investment dealers or prohibiting any registrant from providing market advisory or underwriting services to an issuer where an affiliate is also a lender -- would be a significant departure from market practice and may adversely affect capital markets. As such, if any of these proposals are pursued, further analysis and consultation with market participants should occur to clearly identify the policy objective and the market implications of any amendments.

Proposal 19: Improve corporate board diversity

We support and welcome the Taskforce's focus on the issues of corporate diversity and board renewal. The institutional investor community at home and abroad is increasingly focused on the importance of diversity as a key factor in their investment criteria. Many institutional investors and proxy advisory firms have developed voting guidelines designed to ensure boards are held responsible for corporate diversity practices and outcomes. Securities regulators can play a role in shaping corporate governance best practices, ensuring that Canadian capital markets remain competitive and attract global capital.

Since the rules requiring disclosure of the representation of women in corporate Canada came into force in 2014, market participants have expressed differing views on the rate of progress – some argue that progress to date has been too slow and advocate for the adoption of additional measures, while others believe the rules have led to meaningful change which will only improve over time.

In the fifth annual study published by Canadian securities regulators in 2019, there were undeniable gains at the board level: 73% of issuers (up from 49% in 2015) have at least one woman on the board, 50% of issuers (up from 15% in 2015) have adopted a policy regarding the representation of women on the board, and 22% of issuers (up from 7% in 2015) have adopted targets for female directors. This data demonstrates that the disclosure-based rules adopted in Canada have had an impact on market practice. However, notwithstanding these improvements, women continue to occupy only 17% of all board seats (up from 11% in 2015) and 27% of issuers continue to have no female directors. At the executive officer level, the data does not yet illustrate the same impact: 36% of issuers have no female executive officers (a modest improvement from 40% in 2015) and the adoption of targets is extremely rare with only 3% of issuers adopting executive officer targets. The issuer base across Canadian capital markets is, of course, diverse and all of the data above varies greatly depending on industry and market capitalization.

The Canadian securities regulatory approach to corporate governance has historically been focused on disclosure, rather than mandating the adoption of any particular practice. Excluding the requirement to have a fully independent audit committee, regulators have generally avoided rules that are prescriptive and instead deferred to boards of directors to determine how best to govern themselves and the companies over which they exercise oversight. This disclosure-based model to corporate governance is reflective, in part, of the fact that a "one-size-fits-all" approach to governance is not considered appropriate in the Canadian market, and a recognition that boards of directors are best-positioned to determine how and when to introduce and implement evolving corporate governance practices.

In 2005, National Policy 58-201 – *Corporate Governance Guidelines* ("**NP 58-201**") was introduced and codified a number of corporate governance best practices, including that boards "should" have a majority of independent directors and "should" adopt board mandates and a written code of business conduct and ethics. These guidelines have had a dramatic impact on Canadian capital markets and resulted in significant adoption of these practices by reporting issuers.

Rather than prescribe mandatory targets or term limits, which will inevitably be a rigid and inflexible model that may not be suitable for all issuers, consideration could instead be given to amending NP 58-201 to include a dedicated section on best practices on corporate diversity. In the amended guidelines, regulators could provide issuers with direction on the types of practices that boards "should" adopt to improve corporate diversity which could include a variety of

measures, in whole or in part, such as the adoption of targets, term limits (based on age and/or tenure), diversity policies, recruiting, director performance/contribution assessment and board nomination practices. As we saw following the initial adoption of NP 58-201, such amended guidelines can, over time, together with continued pressure from the institutional investor community, contribute to the development of a market standard for corporate diversity best practices.

We also note, in particular, that the mandatory adoption of board term limits could prove challenging for many issuers (illustrated by the fact that board term limits have not been widely-adopted, with only 21% of issuers having term limits in place in 2019, a modest increase from 19% in 2015). Controlled companies, for example, have representatives of the controlling shareholder that hold board seats for the long-term. Likewise, it is common for the Chief Executive Officer ("**CEO**") to sit on the board, typically coinciding with his or her tenure as CEO. Some directors have deep institutional knowledge or industry experience that is uniquely valuable to the board and management, and not easily replaced. While we agree that mechanisms to facilitate board renewal are important to create opportunities for improving diversity, such renewal can be achieved through a variety of measures, including the adoption of term limits based on age and/or tenure, increasing the size of the board to add new and diverse voices, and rigorous director assessment processes to identify underperforming directors and expertise gaps on the board thereby creating openings for board renewal and opportunities for increased diversity.

Rather than set arbitrary or inflexible requirements for board term limits or diversity targets that will inevitably lead to the development of various exceptions, providing guidance on best practices would garner more widespread support and lead to more successful outcomes. However, before any amended guidelines (or prescriptive rules) relating to corporate diversity are put in place, we would encourage the OSC to build on the work it has already done in this area by conducting and publishing a report that studies diversity-focused securities regulation adopted in other jurisdictions, with supporting data on the market impact of such regulation. Providing market participants with references to empirically-based studies and practices adopted in other jurisdictions that have shown to yield results will be important to get broad-based support on these initiatives.

In addition, before introducing any new diversity-based requirements, we reiterate the importance of cross-Canada harmonization. As noted by the Taskforce, the *Canada Business Corporations Act* (the "**CBCA**") was recently amended to require disclosure regarding the representation of women, Aboriginal peoples, persons with disabilities and members of visible minorities. By contrast, the Taskforce proposal focuses on women, Black people, indigenous people and people of colour. In order to further the OSC goal of reducing the regulatory burden, a patchwork of rules under corporate and securities laws with diverging terminology and inconsistency in the categories of groups that are covered (whether disclosure-based or otherwise) should be avoided.

Finally, we note that the SEC currently has no rules in place (or under consideration) that prescribe the adoption of a diversity policy, diversity targets, board term limits or any other practice to improve diversity. Instead, consistent with the Canadian approach to corporate governance, the only diversity-related requirements (which are narrower than current Canadian rules) are disclosure-based. While we are supportive of Ontario's leadership in this area, we are concerned that in an era of heightened competitiveness in the capital markets and a shifting trend away from the public markets, any further misalignment with the U.S. or the introduction of additional requirements may make Canadian capital markets less attractive.

Proxy System, Corporate Governance and Mergers and Acquisitions (M&A)

Proposal 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

We have the following comments on this proposal:

- We are supportive of the guidance relating to conflicts of interest, the determination of vote recommendations and the development of proxy voting guidelines included in National Policy 25-201 - *Guidance For Proxy Advisory Firms*.

- Our experience with proxy advisory firms ("**PAFs**") is that they typically provide detailed information on the basis for their recommendations and will engage with issuers who provide timely feedback on the PAF's recommendations.

- We are also supportive of the following conclusion of the CSA provided in response to the comments received on National Policy 25-201 - *Guidance For Proxy Advisory Firms*: "We do not believe that it is the responsibility of the CSA to recommend a specific business model for proxy advisory firms. We expect proxy advisory firms to identify, manage and disclose actual or potential conflicts of interest. This approach is in line with the approach adopted for designated rating agencies in Canada."

- We also note that issuers have the primary responsibility and right to provide disclosure to investors to enable them to make an informed decision at an upcoming meeting, and we submit that no changes to the statutory framework are required to permit issuers to communicate with their shareholders.

- We recommend that the Taskforce further consider the practical challenges of costs associated with introducing a statutory framework for PAFs, including a statutory right of rebuttal in the proxy voting system. In particular, we would recommend that further analysis be completed on the following:

    - Whether the proposed regulation would be unduly expensive and/or burdensome for PAFs to provide their services or for the securities regulators to regulate the conduct of PAFs.

    - The timing pressures and logistical challenges involved, including the potential for delays in providing proxy voting advice. In particular, consider the tighter deadlines and specific timeframes imposed by Canadian corporate and securities laws in contested director elections and/or solicitations involving merger and acquisition transactions.

    - Whether there is any empirical evidence in Canada detailing the rate of factual errors, incompleteness and/or methodological weaknesses included in proxy voting reports.

    - Whether the proposed changes will have a meaningful impact on shareholder engagement.

- o The actual impacts that the recent regulatory initiatives undertaken by the SEC will have on shareholder voting/engagement as well as the integrity of the capital markets as a whole.

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

To properly assess the impact of decreasing the reporting threshold in Ontario from 10% to 5%, the Taskforce should take into consideration the unique features of Canadian securities and corporate laws as well as the Canadian capital markets. In determining whether the regulatory framework adopted in the U.S. on this point would be appropriate in Canada, we recommend that the Taskforce also consider and analyze the potential risks, market impact and unintended consequences of such a change. In doing so, the Taskforce should consider:

- The adverse impact on small- and mid-cap companies and the reduction of market liquidity due to institutional investors and/or passive investors restricting their investments in small- and mid-cap companies in order to avoid being subject to the early warning reporting requirements.

- The average market capitalization of Canadian public issuers when compared to U.S. public issuers.

- The liquidity of the Canadian capital markets when compared to the U.S. capital markets.

- The number of Canadian public issuers that are cross-listed on a U.S. stock exchange and therefore already subject to the SEC's 5% ownership reporting requirements.

- There are many differences in the bid and reporting rules in the two jurisdictions, so it is not necessarily the case that the 5% threshold in the U.S. is necessary or appropriate in the Canadian context. For example, in contrast to the U.S. where there is a 10-day filing deadline, early warning reporting in Canada is accelerated through the requirement to file an early warning report within two business days of the triggering event. In addition, in Canada, once an obligation to file an early warning report is triggered, a shareholder is required to cease all purchasing efforts for two business days. Currently, this moratorium is applicable until the shareholder acquires more than 20%. A similar moratorium does not exist in the U.S. rules. So, a shareholder acquiring a toe-hold in the U.S. can acquire more than 5% before its first report is filed, even if they are making purchases in the market. By contrast, if the threshold were changed to 5% in Canada, a shareholder would have to stop purchasing once it reached 5% and thereafter whenever a new report is required and wait for two days following any reportable event before it could continue purchasing. That would be a significant impediment to a shareholder acquiring a toe-hold in Canadian public issuers.

The Taskforce should also consider the increased regulatory burden and costs that would be borne by market participants as a consequence of adopting this proposal.

Proposal 22: Adopt quarterly filing requirements for institutional investors of Canadian companies

Similar to the reporting requirements established under Rule 13-1 of the Securities Exchange Act of 1934 ("**Rule 13-1**"), the Taskforce's proposal would provide useful information to issuers and

other market participants by increasing the public availability of information regarding the securities holdings of institutional investors. Such oversight of the Canadian public markets would result in the increase of investor confidence. However, similar to the early warning reporting proposal, the Taskforce should also consider the increased regulatory burden and costs that would be borne by market participants as a consequence of adopting this proposal.

We also have the following comments/questions for the Taskforce on this proposal:

1. What securities would be subject to the reporting requirements?

    - We note that in the United States, Form 13F securities are primarily comprised of U.S.-listed equities (including foreign private issuers, closed-end funds and exchange traded funds), though certain equity options, convertible debt securities and warrants are also included. Similar to the SEC, would the OSC be required to publish a list of all reportable securities each quarter?

2. How will the triggering threshold to file a quarterly report be determined?

3. Which, if any, positions by institutional investors would be reportable?

    - We note that under Rule 13-1:

        - Only gross long positions are required to be reported and short positions are neither reported nor netted out of reported positions.

        - A position can be excluded if the reporting person holds fewer than 10,000 shares and the fair market value of those holdings is less than US$200,000. (The SEC has recently proposed to eliminate this exclusion.)

4. What dollar threshold would trigger a reporting obligation in Canada? Does the recent SEC proposal to increase the reporting threshold from US$100 million to US$3.5 billion impact the Taskforce's consideration of this proposal?

5. What are the potential compliance costs faced by institutional investors in connection with filing quarterly reports?

Given its relevance to the Canadian public markets, consideration should be given to the following exemptions already captured under the current United States regime.

- ***Personal holdings exemption***. Section 13(f)(4) of the Securities Exchange Act states that the Commission shall not disclose Form 13F information that identifies securities held by a natural person, an estate, or a personal trust (excluding business trusts or investment companies).

- ***Confidentiality exemptions***. Section 13(f)(4) also states that the SEC may prevent or delay public disclosure of Form 13F information for public interest reasons or the protection of investors (such as the protection of trade secrets). In order to grant confidential treatment under Section 13(f), the SEC must determine that such action is necessary or appropriate in the public interest and for the protection of investors or to maintain fair and orderly markets. It is worth noting that, under the U.S. rules, confidential treatment lasts indefinitely when it is granted to a particular Form 13F filing

based on the personal holdings exemption. A grant of confidential treatment does not, however, exempt the filer from submitting Form 13F every calendar quarter. In addition, such a grant of confidential treatment does not guarantee that the filer will always receive confidential treatment because changed circumstances may make the personal holdings exemption inapplicable.

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

As noted by the Taskforce, many TSX-listed issuers are, or will be in the near future, subject to requirements under other securities or corporate laws to regularly hold an advisory shareholders' vote on the board's approach to executive compensation. For example, SEC rules require all domestic issuers to hold a separate advisory shareholder vote to approve the compensation of the company's named executive officers. SEC rules also require that domestic issuers hold a shareholder vote to determine the frequency of future say-on-pay votes, giving shareholders the option to vote every one, two or three years. Within Canada, federal bill C-97, introduced in April 2019, proposes to amend the CBCA to require corporations governed by the CBCA to hold a non-binding advisory say-on-pay shareholder vote at each annual meeting of shareholders. However, the CBCA amendments and related regulations have not yet been finalized. As a result, specific requirements and timing remain unclear, including whether all CBCA corporations or just a subset will be required to comply. The Taskforce's proposal could therefore bring the Ontario securities law requirement in line with other securities or corporate laws applicable to reporting issuers. In doing so, it will be important to have regard to these other requirements and how any proposed new rules could interact. A key consideration should be whether the new rules can be made consistent with those already existing or proposed, and at a minimum not conflict.

We expect that there will be broad market support of the proposed say-on-pay vote requirement among institutional investors, proxy advisory firms and other Canadian governance agencies, many of whom already encourage or have provided commentary on the practice. A say-on-pay vote provides shareholders with the opportunity to provide specific feedback to the board on the company's compensation practices. Absent this mechanism, shareholders are left with only informal methods of providing feedback directly to the board or by indicating broad dissatisfaction through withholding votes for the election of compensation committee members. That latter alternative may be undesirable from both shareholder and company perspectives as it lacks specificity. It is also notable that, even if not subject to a legal requirement, many TSX-listed issuers voluntarily conduct advisory say-on-pay votes on a regular basis.

The subset of reporting issuers subject to any new requirement should be carefully considered by the Taskforce. The Taskforce has the goal of improving the competitiveness of Ontario's capital markets, including by reducing regulatory burden. Imposing a say-on-pay vote requirement could create additional compliance and disclosure burdens for new or smaller issuers. Although the current proposal focuses on TSX-listed issuers, other additional indicia could be considered. The Taskforce may also wish to consider whether any new requirement should apply to controlled companies, where the outcome of the vote would be determined by the controlling shareholder. Alternatively, it could be left to the board to determine whether it will hold a vote with a requirement to explain why if chosen not to do so.

The alternative noted above also raises a potential inconsistency between the Taskforce's proposal and existing Canadian securities rules on governance practices. As previously noted, Canadian securities rules regarding corporate governance practices are typically not prescriptive, focusing instead on best practice guidelines and disclosure matters based on a "comply or explain" regime.

Imposing a requirement to hold a say-on-pay shareholder vote would depart from this model, and consideration should be given to whether a "comply or explain" alternative may be more appropriate for the reasons described above, among others.

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

We support and welcome the Taskforce's continued focus on regulatory initiatives to improve reporting on ESG-related information. As with our response to the Taskforce proposal on diversity, while we encourage the publication of additional guidance on best practices on ESG-disclosure (similar to the climate change-related risk guidance published in Staff Notice 51-358 last year), and welcome regular continuous disclosure reviews to share ESG-related disclosure trends, overly-prescriptive requirements should be avoided. This is an area that is evolving in real-time and that is in large part being driven by the institutional investor community and global reporting standards that market participants are only beginning to digest. We expect the approach to ESG disclosure will vary by industry. We also note that recommendations have been made at the federal level to amend the CBCA that would phase in certain "comply or explain" climate-change disclosure requirements. As with the recent CBCA amendments requiring specified diversity disclosure, we would discourage the adoption of securities rules that may differ from or be inconsistent with similar rules currently under consideration at the federal level.

Proposal 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 proposals that facilitate shareholder voting, including in contested meetings. Our experience with universal proxies is that they do not eliminate complexity for shareholders, who often still receive multiple proxies and conflicting instructions on the completion of those proxies. In addition, the transfer agents and other intermediaries that are involved in the collection of votes have electronic systems that are not as flexible as paper proxies, often introducing impediments to giving effect to universal proxies through the vote collection/instruction process. For example, we have been told by transfer agents that all the names included in a universal proxy are automatically coded as being "recommended" by management, which would result in dissident nominees receiving votes when management is delegated a shareholder's votes (or a proxy becoming invalid because it would result in too many votes being cast).

As a result, universal proxies should only be mandated once the key market intermediaries have confirmed that they are able to give effect to them without disenfranchising shareholders through an increase in invalid proxies or inaccurate recording of voting instructions.

In addition, any proposal to facilitate universal proxies should also take into account statutory requirements under corporate or other law regarding how proxies can be used and voting must be conducted.

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

We do not think that Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions* ("**MI 61-101**") needs to be amended to provide for additional requirements and guidance on the role of independent directors in conflict of interest transactions. However, it would be more user friendly to consolidate the guidance included in the companion policy to MI 61-101 with Multilateral CSA Staff Notice 61-302 – *Staff Review and Commentary on Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions*.

Given its breadth and scope, and that there are many different types of transactions that are captured under MI 61-101, retaining guidance as opposed to rules-based principles will reduce the circumstances in which issuers will need to obtain an exemption because of a particular rule not being applicable to an issuer.

Given the evolving market conditions and continuing growth in the Canadian public markets, the Taskforce should consider whether such codification would result in minority shareholders having greater confidence in the role of an independent committee.

We note that:

- Although MI 61-101 only mandates a special committee in the circumstances of an insider bid, the companion policy to the instrument urges the use of special committees in other transactions. The staff notice reinforces this position, catching up with current practice, while also acknowledging in certain cases governance arrangements, other than a special committee, may satisfy the need to have transactions overseen by unconflicted directors.

- The staff notice already provides helpful guidance around what CSA Staff consider to be an effective use of an independent committee of independent directors, including when to use, the composition, timing and effectiveness, scope of mandates and the role in negotiations such independent committees should have.

- The OSC, in its decision in *Re: The Catalyst Capital Group Inc.*, already provides helpful guidance regarding the need to form a special committee early in the process.

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

The public interest jurisdiction that is provided to the OSC in section 127 of the Act provides the regulator with sufficiently broad remedial powers to make orders in connection with M&A transactions and proxy fights. In its reasons in *Asbestos*, the Supreme Court noted not only the range of orders enumerated in section 127(1), but also that the scope of the public interest jurisdiction is enhanced by the ability to impose conditions on such orders under section 127(2): "[t]he breadth of the OSC's discretion to act in the public interest is also evident in the range and potential seriousness of the sanctions it can impose under s. 127(1). Furthermore, pursuant to s. 127(2), the OSC has an unrestricted discretion to attach terms and conditions to any order made under s. 127(1)."

Examples of the use of the public interest jurisdiction in the M&A context highlight why the existing section 127 powers are adequate to address the issues that come before the OSC and the

ability to make appropriate remedial orders. In *Sears*, the OSC imposed a condition on the ability of an insider bidder to proceed with a transaction that engaged violations of the takeover bid rules as well as public interest concerns arising from collateral benefits embedded in certain agreements between the bidder and target shareholders: the remedy was that transaction was permitted to proceed only if the bidder amended its disclosure to state that approval of a second step transaction was subject to minority approval excluding the recipients of collateral benefits. In *Patheon*, the OSC would have granted an order sought by a target's special committee unless the bidder took a number of steps, including terminating a voting agreement. It was not necessary for the protection of investors or for otherwise achieving the goals of the Act to give the OSC the express power to terminate the agreements at issue or suspend the relevant voting rights in either of those cases.

The powers of the OSC under section 127 are therefore adequate to remedy securities law issues that arise in the context of M&A transactions and proxy fights; indeed we are unaware of any case in which a panel of the OSC identified a remedial restriction that prevented it from acting where the public interest would otherwise have merited intervention. Expanding the powers of the OSC to permit it to make final determinations terminating contracts rights, property rights or voting rights – in effect, to give the OSC the powers of a superior court – is unnecessary and inconsistent with the role of the OSC in M&A and proxy fight matters. The OSC has stated repeatedly that, in its adjudicative function in M&A transactions, it is not performing the role of a court and cannot do so effectively due to time, process and other limitations. The public interest jurisdiction provides the OSC with the ability to respond nimbly and in a targeted, fact-specific manner in response to issues that arise under securities law in the context of real-time disputes.

We note that while the British Columbia Securities Act has been amended to include new remedial powers applicable in M&A and proxy fight circumstances, there is not yet any consensus that those powers were needed or the circumstances in which they are appropriately exercised.

Finally, with respect to proxy fight matters specifically, the court has statutory jurisdiction to deal with shareholder meetings and voting and are capable of intervening where disputes arise in that context.

Proposal 29: Introduce rules to prevent over-voting

In the *CSA Staff Notice 54-305 - Meeting Vote Reconciliation Protocols,* we note that CSA staff, with the assistance of the technical committee (consisting of The Canadian Depository for Securities Limited ("**CDS**"), Broadridge, intermediaries and transfer agents), undertook to monitor the voluntary implementation of the protocols over the 2017 and 2018 proxy seasons, and assess the need for any enhanced regulatory measures, such as whether aspects of the protocols should be codified as legislation or whether entities that engage in meeting vote reconciliation should be designated as market participants or subject to compliance review. We would suggest waiting until the CSA has provided an update on their review so that we can properly assess the impact of their findings.

Further dialogue with industry participants such as Broadridge, CDS and voting intermediaries and transfer agencies should be carried out to determine the availability of technological advances that could potentially be a more effective and less expensive tool to reduce the risk of over-voting in Canada. For example, we would be interested in hearing whether Broadridge's Over Reporting Prevention Service has been successful in eliminating over-voted positions in Canada. It would also be useful to understand whether there have been any innovations in connection with the recent online/virtual meetings that are relevant.

Proposal 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.

It is critical to balance an issuer's desire to know the identity of their shareholders with the protection of their shareholders' privacy. While the proxy voting infrastructure under Canadian securities laws already achieves this objective, we note that if reforms to the NOBO-OBO concept are being undertaken, the Taskforce should:

- Consider whether any modifications to the current system would compromise the security of a brokerage firm's proprietary or confidential information.
- Take into account the privacy concerns noted by several institutional investors. We note that the Australian model protects investor privacy by prohibiting disclosure of the identity and address information on matters unrelated to the interests or rights of shareholders in the affairs of the issuer.
- Address institutional investors' concerns that their trading patterns may be identifiable to the public.
- Better understand how a direct communication framework would increase shareholder participation and reduce costs.

<u>Modernizing Enforcement and Enhancing Investor Protection</u>

Proposal 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

We generally support changes aimed at improving the efficacy of regulatory enforcement through the reciprocation of orders. We agree that intra-provincial reciprocation will further improve the efficiency of Canadian capital market regulation, particularly when similar automatic reciprocation provisions exist in other provinces and territories. However, in our view, reciprocal orders should only be enforced after all appeals are exhausted in the originating jurisdiction. Further, it should be made clear in any new legislative revision that orders from other Canadian jurisdictions may only be enforced in Ontario if the conduct that breached the foreign legislation would also breach Ontario law.

We have concerns with the proposal relating to reciprocation of non-Canadian regulatory orders. Foreign regulators operate under a different policy and procedural framework. It is possible that registrants in other jurisdictions are not afforded the same procedural protections as under Ontario law, or that decisions are based on policy motivations that do not exist in Ontario or Canada. Therefore, we would suggest that this reform be limited to reciprocation within Canada amongst the provinces and territories.

We also have concerns with the proposal that settlements with other Canadian (or foreign) capital market regulators would be enforced in Ontario as if they were made with the OSC. Settlements are a negotiated resolution reached between the respondent and the regulator. If the parties negotiate for an order imposing certain terms (apart from the order approving the settlement

itself), this could be reciprocated in Ontario as contemplated. However, if the parties do not negotiate for such an order, it would not be appropriate for the OSC to automatically reciprocate the terms of a foreign settlement. This would result in imposing conditions on the parties' ability to freely negotiate the terms of their settlements in a way that would be inconsistent with the OSC's over-arching policy goal of encouraging settlement.

Proposal 35: Improve the OSC's collection of monetary sanctions

a. 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

We understand the need for the OSC to have effective powers to freeze, seize or otherwise preserve property. We support the proposed expansion of these powers to address suspected cases of fraud or other intentional wrongdoing where there is a prospect of investor or other stakeholder financial loss. However, while the OSC should continue to have the ability to quickly impose such remedies to prevent the dissipation of potentially ill-gotten gains, the Ontario Superior Court should continue to have a meaningful oversight role. That oversight role should continue to include adjudication of the proposed continuation of such orders through the application of a reasonably rigorous test such that as the test that has been applied by the Court subsequent to the July 2014 amendment to the Act.[1]

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

The regulatory tools currently available are inadequate to respond to misleading commentary made about reporting issuers by persons who stand to benefit from such commentary. For example, attempts by securities regulators to use administrative proceedings to respond to "short and distort" schemes have failed because the tools relied upon require proof of fraudulent conduct. The same limitations apply to "pump and dump" schemes. Therefore, market participants who (i) release commentary about reporting issuers and also (ii) have a direct or indirect financial interest in trading in the reporting issuer's securities should be subject to regulatory sanctions in an administrative proceeding commenced by Staff of the OSC under section 127 of the Act, or in a civil proceeding commenced by Staff under section 128 of the Act, if (iii) that commentary is misleading in a material respect and (iv) if the market participant failed to undertake a reasonable investigation before releasing such commentary. The proposed prohibition on releasing misleading commentary should apply irrespective of the media in which the commentary is released. A prohibition on misleading commentary of this kind will further the goals of investor protection and confidence in capital markets and fair and efficient capital markets.

We do not recommend creating a civil cause of action in the Act related to misleading commentary because of the potential for abusive attempts to limit capital markets-related speech, acknowledging the contribution that such speech can make to capital markets and investors. Nor do we recommend allowing private parties standing to instigate section 127 proceedings in respect of misleading commentary. By limiting the ability to seek a remedy for misleading commentary to Staff, the risk that an issuer may seek to shut-down valid but negative criticism made by a reporter, analyst, or investor is fully mitigated as are other risks of abuse.

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[1] *OSC v Future Solar*, 2015 ONSC 2334

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

Further clarity is required regarding the nature of the "significant changes" proposed under this section. For example, what would an obligation to "prepare and produce" entail, if anything, beyond an obligation to produce relevant documents? Do the proposed changes purport to expand the OSC's reach beyond those matters within Ontario's jurisdiction? Are these reforms targeted at the collection of data held on servers in foreign jurisdictions?

We also suggest that any additional production order and compulsion powers be guided by the principle of proportionality and the right to withhold privileged information, as further discussed in Proposals 42 and 43.

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

We agree that persons or companies subject to OSC summonses would benefit from more transparency about the entire process. Reforms that allow persons or companies to apply to an OSC adjudicator for clarification of orders relating to investigations, examinations or summonses would improve transparency, fairness and efficiency in the adjudicative and investigatory process.

One specific mechanism that may aid in providing transparency would be the production of exam briefs in advance of witness interviews – a practice currently employed by other regulators in the capital markets. This practice helps ensure that the interview proceeds smoothly and efficiently.

We support the suggestion that there be an opportunity to meet and confer with OSC staff, following initial production of a subset of responsive documents. Currently, OSC Staff may take a very broad approach to document requests in the context of an investigation. While we understand the rationale behind this approach, it can result in significant financial and time burdens, which are disproportionate to the witness's or target's role in the investigation, often resulting in the production of significant volumes of data that are not relevant to the investigation at issue (on this point, see our response to Proposal 42, below). Building in an opportunity to reasonably discuss, and if necessary adjudicate document production issues into the investigation process would instill greater confidence and fairness in the investigative process.

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

We agree that the confidentiality and disclosure exceptions should be expanded to include some or all of: (a) a prudential financial regulatory authority such as the Office of the Superintendent of Financial Institutions ("**OSFI**") and equivalent regulators, (b) an expanded list of counsel where it would facilitate responses to investigation requests and summonses, (c) 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, (d) the company's board of directors and senior management, and (e) underwriters, if the investigation occurs during the course of an offering. One potential option that balances the respondent's need for some flexibility in disclosure against the OSC's need for confidentiality would be to empower Staff with the authority to permit the respondent to disclose the investigation to specified individuals, without the respondent being required to bring an application under section 17. Expanding the exceptions to the confidentiality restriction, and empowering Staff to grant exceptions would greatly reduce the administrative burden faced by organizations and would

facilitate a more efficient collection and production of relevant non-privileged information to the OSC.

However, we acknowledge that in cases of suspected fraud (or other cases in which disclosure could increase the risk of the suppression, alteration or destruction of relevant evidence), the OSC should retain the flexibility to limit disclosure.

Proposal 42: Ensure proportionality for responses to OSC investigations

We agree that there is a need to ensure that questions and requests for documents are subject to a reasonable or proportional threshold. It is important to ensure that limits apply to a response to OSC investigations and examinations, and that such investigations proceed in an efficient manner. Proportionality is necessarily calibrated to the nature of the case. For example, cases that engage potentially intentional wrongdoing may require broader production requests than cases that do not. Imposing proportionality should not detract from the OSC's ability to pursue enforcement actions against respondents who may have breached provisions of the Act.

There are a variety of processes by which the OSC could implement the principle of proportionality. For example, with respect to document production, the OSC and registrants (or other targets/stakeholders) could be encouraged to come to an agreement on search terms and custodians in advance of production, without prejudice to the OSC's ability to request further production. Absent a concern that a respondent might alter relevant information, there does not appear to us to be a proper justification for declining to collaborate on search terms or custodians for document collection.

Proposal 43: Clarify that requiring production of privileged documentation is not allowed

We agree with this proposal. A party's right to maintain all forms of legal privilege under Canadian common law must be sedulously protected. We have been concerned with the approach of some regulators (in Canada and abroad) who, by design or intentionally, have taken steps to wrest control of decisions over whether a document discloses privileged information out of the hands of respondents and into the hands of regulatory staff.

We suggest that the specific procedures governing the production of privilege logs be flexible and guided by the principle of proportionality. For example, in circumstances where a respondent claims privilege over a large number of records, it would be less onerous on both the respondent and OSC Staff for the respondent to only be required to produce a privilege log in respect of the subset of records over which a privilege claim is being questioned.

Further, we encourage consideration be given to addressing other, statutory privileges, such as the Prescribed Supervisory Information ("**PSI**") privilege that belongs to OSFI. We recommend that language be added to the Act confirming that documents subject to statutory privilege (such as PSI) cannot be required to be produced during OSC investigations or examinations. Further, where the privilege does not belong to the respondent, we would recommend that clarifications to the Act confirm that it is the burden of the OSC to negotiate approval for production from the other regulators (such as OSFI).

Proposal 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

We support this proposal as a useful and practical means of further streamlining matters that proceed to enforcement. We would further recommend that the principle of proportionality, outlined in Proposal 42, be applied to determine a reasonable timeline for the invitation to discuss OSC Staff's proposed statement of allegations. While three weeks may be reasonable in many circumstances, there may be circumstances in which parties require additional time in order engage in appropriate internal reporting and corporate governance procedures.

Proposal 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 agree that reaching a resolution on enforcement matters is often in the best interests of both OSC Staff and market participants. As the Taskforce has noted, a significant impediment to achieving settlement of a securities regulatory matter is the added exposure that can arise when a regulatory settlement is used as the basis of or to bolster a civil lawsuit. In answer to this problem, the OSC has permitted no admission settlements in limited circumstances. In our view, the no admission settlement regime should be expanded and a statutory limitation of liability (preventing reference or any other use of a regulatory settlement in a civil lawsuit) should be enacted.

We would like to understand what greater "confidentiality of dialogue" would entail, and whether this would impact admissions made in the context of negotiated settlements. Further, more clarity may be required regarding what specific "privacy protections" would be offered, and how these would be used to minimize "third party liability" and therefore "drive towards a resolution."

Proposal 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

In our view, the non-binding nature of the OBSI processes is foundational to its dispute resolution framework. Absence of binding orders is a characteristic feature of an ombudsman, and the reason why such bodies can operate without the same procedural and substantive fairness requirements that apply to courts and tribunals. The flexible and efficient way in which the OBSI operates is therefore a function of its non-binding nature, which is one of its strengths as opposed to an issue requiring reform.

We are concerned that the proposed regulatory framework has the potential to become unduly burdensome and not achieve the stated goals of protecting everyday retail investors. To maintain procedural fairness, any binding process would have to adopt procedural checks and balances and a judicial appeals process. The necessity of these processes would cause overlap with the many pre-existing adjudicative options available to claimant (including small claims court, simplified procedures, and the Investment Industry Regulatory Organization of Canada (IIROC) arbitration process). These pre-existing options can be cost-effective means of achieving resolution of an

investor claim, with the benefit of an adversarial process that is fair to all parties. To date, the OBSI dispute resolution process has been complementary to these other processes, and there is no good reason to change that status quo.

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We would be happy to discuss any of our above comments with you by phone or e-mail.

Yours truly,

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