CFA Societies Canada

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September 7, 2020

VIA EMAIL

CMM.Taskforce@ontario.ca

Dear Sirs/Mesdames:

Re: Consultation — Modernizing Ontario's Capital Markets (the "Consultation")

We appreciate the opportunity to respond to this consultation and the topics under consideration by the Taskforce. We believe several of the recommendations can serve to significantly modernize Ontario's capital markets. In our response to this consultation, we have outlined our general comments, followed by specific responses to the proposed Taskforce recommendations, and their related questions. Finally, in the spirit of the consultation and the Taskforce's stated goals, we canvassed our members and have highlighted several additional opportunities that we believe will foster efficiencies and serve to modernize Ontario's Capital Markets.

This response has been drafted in partnership with CFA Societies Canada[1], a collaboration of CFA Institute and our 12 Canadian member societies, with input from CFA Institute[2]. The Canadian Advocacy Council of CFA Societies Canada[3] (the "CAC") appreciates the opportunity to provide the following comments on the Consultation.

General Comments

We have responded to several of the specific questions posed in the Consultation below, however we wish to make general comments relating to the proposals for modernizing enforcement at the OSC.

Several proposals involve enhancing the OSC's enforcement powers in various ways, including by obtaining production orders and enhancing compulsion powers. We support removing barriers that prevent staff from administering our securities laws and regulations, and from promoting investor protection. Items that would place greater restrictions on enforcement staff should not be pursued unless there is clear evidence that these changes would not compromise investor protection by hampering the efficacy of the enforcement function of the OSC. For example, we are concerned that proposed

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[1] CFA Societies Canada aspires to lead the investment industry in Canada by advocating for the highest professional standards, integrity, and ethics for the ultimate benefit of Canadians.

[2] CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion of ethical behavior in investment markets and a respected source of knowledge in the global financial community. Our aim is to create an environment where investors' interests come first, markets function at their best, and economies grow. There are more than 177,600 CFA charterholders worldwide in 164 markets. CFA Institute has nine offices worldwide and there are 158 local member societies. For more information, visit www.cfainstitute.org.

[3] The CAC is an advocacy council for CFA Societies Canada, representing the 12 CFA Institute Member Societies across Canada and over 18,000 Canadian CFA charterholders. The council includes investment professionals across Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. Visit www.cfacanada.org to access the advocacy work of the CAC.

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new statutory amendments or other mechanisms to ensure there is a reasonable or proportional threshold applicable to responses provided in an OSC investigation or examination will weaken those enforcement proceedings. In addition, a procedural change to provide an invitation to discuss OSC Staff's proposed statement of allegations at least three weeks before initiating proceedings could unduly prolong the proceeding, particularly in cases where it is unlikely the respondent would wish to initiate discussions. We also do not believe it is necessary to specify that requiring production of privileged documentation is not allowed for OSC investigations or examinations as such language will result in protracted enforcement proceedings and put the onus on OSC staff to prove a document is not privileged, when it is already its practice not to collect such information.

We are supportive of adding offences for obstruction and non-compliance with a summons only if it is clear that those would be effective incremental tools for enforcement staff. If leave from an OSC tribunal before it could initiate contempt proceedings could be obtained quickly and not hinder an investigation, it could provide appropriate protection to persons under investigation. We also generally agree with some of the concerns about misleading or untrue statements being made about public companies, but believe that the burden of evidence and frequency of problems for incremental legislative change or regulatory rulemaking has not yet been met, and that more study of this issue is likely required before any such action be taken. We are particularly concerned with the specific concerns about misleading or untrue statements in relation to short-selling and believe that concern is more rightly directed at misleading or untrue statements of any variety, be it long-biased/promotional in nature or related to short-selling. We believe that the correct approach is more rigorous enforcement of existing rules, with reference to well-established norms of disclosure, conflict management, objectivity, and independence – such as those in the CFA Institute Research Objectivity Standards. In practice and through more study of the issue and more frequent investigative and enforcement actions, an objective standard should be set as the threshold for investigation and enforcement, to ensure fairness in application.

The Taskforce has also proposed to incorporate additional confidentiality exceptions in the *Securities Act* to allow disclosure of investigations. We believe a measured broadening of the confidentiality exceptions available for disclosing an investigation or examination order or summons could be helpful. For example, clarity could be provided that if an investigation involves a registrant, that the firm's CCO could be informed. We also believe that an expanded list of counsel would be helpful in the event specialized expertise is required. Furthermore, if the investigations involve an individual with a specific professional designation, they might be required or encouraged to disclose the investigation (particularly disciplinary matters) to their professional governing body, and a concurrent professional conduct investigation could be a desirable public-interest outcome from such an allowance for sharing investigation information.

The Taskforce has proposed increasing the maximum for administrative monetary penalties to $5 million. While we do not have a position on the appropriate dollar figure for potential sanctions, we agree that an increase to the maximum for such penalties may be appropriate for firms, though not necessarily individuals. Presumably, higher monetary penalties would be imposed for intentional or repeat negligent conduct rather than imposed in proportion to a firm's revenue.

We support the proposals to expand the OSC's powers to ease collection of monetary sanctions, including the non-renewal of a driver's licence or licence plates to incentivize payment as illustrative examples. It is important for investors to have confidence in our capital markets, much of which is publicly attributable to the success of imposing and collecting sanctions from those who commit wrongdoing.

We would also support establishing a process by which amounts collected by the OSC pursuant to disgorgement orders be deposited into court for distribution to harmed investors where financial harm is provable. Once a process is set up, it should be regularized from a structure and practices perspective, but not relied upon to the detriment or replacement of other remedies available to harmed investors such as civil lawsuits, and should not be seen as in any way lessening the civil liability or amount due in restitution via a complaint or other adjudicative process to a wronged investor, or treated as a credit against other amounts payable by an offender.

We believe investigative tools can also be further strengthened by continuing to support and encourage the existing whistleblower program in Ontario.

Turning to the ability of shareholders to exercise their rights and hold issuers' management and incumbent board members accountable, we're significantly concerned that the adoption of the relevant recommendations in the Consultation will significantly tilt the balance of corporate governance in favour of incumbent issuer management and directors, to the detriment of their accountability to shareholders. Furthermore, we believe this would be to the detriment of investors, confidence in Ontario's capital markets, and the public interest. We encourage the Taskforce to re-evaluate both the individual and aggregate effects of their recommendations (particularly numbers 20-22, 24, 30, and 36) in this regard.

Specific Consultation Questions

We wish to respond to the following specific consultation questions. For ease of reference, we have utilized the same numbering as that found in the Consultation.

2.1 Improving Regulatory Structure

Ontario Securities Commission (OSC) Governance

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

Discussion: Given the significant role the OSC plays in relation to the vitality of the capital markets and investments in Ontario's businesses, the Taskforce proposes incorporating the fostering of capital formation and competitive capital markets to the OSC's mandate to encourage economic growth. This would lead to the development of a competitive and innovative capital markets regime and would be a timely response to *reinvigorate a post-COVID-19 pandemic economy in Ontario. How would incorporating capital formation and fostering competitive capital markets into the OSC's mandate help spur economic growth in Ontario? Would such changes impact the OSC's remaining mandates (i.e., fostering fair and efficient capital markets, protecting investors and reducing systemic risk)?*

Response: We agree that incorporating fostering capital formation and competitive capital markets into the OSC's mandate could help spur economic growth in Ontario by helping to prioritize these activities for market participants. We do not believe the additional mandates should be allowed to impact or act to the detriment of the existing mandates of the OSC. We believe that should this additional mandate be ultimately recommended by the Taskforce, that robust incremental governance controls must be developed and introduced such that the various aspects of the OSC's mandate are appropriately balanced and that the new mandate would not be allowed to in any way compromise or supersede those mandates that already exist in the Ontario Securities Act.

As an example, adding fostering competitive capital markets as a mandate might spur a review of existing regulation that could currently unintentionally favor larger dealers. Small and medium sized dealers play an important intermediary role in our market's supply and demand dynamics and in capital formation. Benchmarking could be done to recent U.S. Treasury programs that facilitate capital formation through the encouragement of smaller dealer and intermediary business models, and access to SME loan programs by small and medium sized dealers and intermediaries could be eased through regulatory capital charge/calculation amendments to not fully penalize these businesses for the liabilities associated with such programs. Certain dealers (as contemplated elsewhere in the Consultation) could be provided with an expanded mandate; exempt market dealers could be more involved in bought deals and syndication activity, thus increasing access to issuers of distribution channels and widening the distribution of private placements. As an additional support to small and medium-sized dealers, who may not have access to significant sources of capital for participation in certain types of transactions, we'd be supportive of the exploration of the creation of a pool of shared risk capital for access by small and medium-size dealers, particularly those without business models or intercorporate relationships giving them access to large pools of low-cost capital.

In addition, with fostering capital formation and competitive capital markets top of mind, regulation of registrants could be reviewed on risk-appropriate basis on the basis of their scope of activities and clients. Lower risk dealers and intermediaries and their business models could be subject to a lighter regulatory touch.

2. Separate regulatory and adjudicative functions at the OSC.

Discussion: The Taskforce is proposing to separate the regulatory and adjudicative function of the OSC. This could be achieved through: (1) a separate tribunal, comprised of adjudicators and its own staff, within the current OSC structure, or (2) by creating a new capital markets adjudicative tribunal as a separate entity from the OSC. A tribunal within the existing OSC structure would report to the existing Adjudicative Committee of the OSC Board and continue to maintain a collaborative, yet *independent, relationship with OSC regulatory policy staff and allow adjudicators to stay knowledgeable on the most recent regulatory developments. A new tribunal would be independent from the OSC and report directly to the Minister of Finance with no institutional relationship with OSC regulatory policy staff. Under both options, the Board of Directors of the OSC, led by the Chair, would focus on the strategic oversight and corporate governance of the regulator. The CEO, a separate position from the Chair, would focus on the day-to-day management of the regulator. Lastly, a Chief Adjudicator would be appointed to oversee the adjudicative responsibilities of the tribunal. Under this proposed structure, the CEO's compensation should be tied to key performance indicators provided to the OSC's board by the Minister of Finance. The key performance indicators should be subject to a periodic review and updates, as necessary. An added benefit of this proposed structure is a more defined line between the Minister of Finance and staff through a Board and CEO who would advance the public policy mandates of capital market growth and investor protection. Would commenters see greater efficiencies in maintaining a separate adjudicative tribunal within the current OSC structure? Would commenters prefer an independent tribunal that reports directly to the Minister of Finance? Under this new structure, who should have the authority to exercise rulemaking (i.e., the CEO or the Board of Directors)? Are there certain matters that should not be transferred to a tribunal, but retained by the regulatory side of the OSC, such as mergers and acquisition hearings? In addition to capital market growth and investor protection, what other public policy imperatives — such as rules or a principle-based approach, for example — should be included in an initial mandate letter?*

Response: We are not aware of specific data or evidence indicating that there are sufficient issues with the current functioning of these processes at the OSC to support a separation of regulatory and adjudicative functions. While we understand that a separate tribunal within the current structure would still allow adjudicators to stay knowledgeable on the most recent regulatory and policy developments, we don't believe that it is necessarily possible or appropriate for Ontario to fully separate rule-making and adjudicative decision-making while retaining the expert policy and regulatory knowledge necessary in the adjudicative function for effective functioning and outcomes without significant duplicative organizational investment.

We note that given securities legislation in Ontario is a principles-based regime, adjudicative decision making is in fact a form of policy making. As a result, utilizing adjudicators familiar with regulatory policies, policy development and relevant background is especially important and in the public interest. Expertise is particularly important when dealing with registrant matters, matters respecting self-regulatory organizations, as well as with respect to M&A matters. As the current structure has a number of advantages, we would strongly suggest further study as to the potential benefits and costs of effective alternative adjudicative structures prior to undertaking a disruptive restructuring.

Self-Regulatory Organizations (SROs)

3. Strengthen the SRO accountability framework through increased OSC oversight.

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Discussion: For the reasons outlined above, the Taskforce proposes giving the OSC greater tools to oversee both SROs and any SRO that may replace them in the future. This would allow the OSC to ensure that both SROs fulfill their public interest mandate and that their approach to regulating registered firms is not overly burdensome or costly. This would also allow the OSC to fulfill its own objective of fostering fair and efficient capital markets through its oversight of the SROs. Stronger governance is also required to ensure that the appointment of the board of directors of SROs is independent of the management of the SROs. The Taskforce proposes adding the following requirements to the OSC's recognition order for both SROs: submit an annual business plan covering all activities conducted in Ontario to the OSC for approval; OSC veto on any significant publication, including guidance or rule interpretations; OSC veto on key appointments, including the Chair and the President and CEO, and term limits for key appointments. Both SROs should also be required in the recognition order to have directors with investor protection experience. Lastly, the compensation and incentive structure applicable to SRO executives should be linked to the delivery of the public interest and policy mandate delegated to these bodies. The Taskforce also proposes that the OSC work with the other CSA regulators to transform how directors are appointed for SROs. Up to half of the directors should be appointed jointly by all CSA regulators and a mechanism should be put in place to resolve CSA disagreements on the choice of appointees in a timely manner. The Taskforce is also proposing to continue ensuring the independence of independent directors by having requirements similar to those applicable to an independent director of a public company, including a cooling-off period between working for a member firm and becoming an independent director. The number of independent directors should be higher than the number of directors from member firms. The actual number would have to be determined by function of how many directors would be appointed by the CSA. The SRO Chair would be required to be an independent director. These measures would instill a sense of confidence in both the oversight and functioning of both SROs. The Taskforce is also considering proposing the creation of an ombudsperson service to address any complaints that SRO member firms may have about services received from their respective SRO. Please provide feedback on the proposed approach and outline any challenges and concerns that may arise from this proposal that would apply to both SROs and any SRO that may replace them in the future. With respect to the proposal to create an ombudsperson service that addresses services provided by both SROs or any SRO that may replace them in the future, would commenters think that would be helpful and what should the role and powers of the ombudsperson service be? If an ombudsperson is recommended, what would be the possible protocols to ensure that it is not treated as a source of appeal of regulatory decisions?

<u>Response</u>: We believe the trust of market participants is important to the effective functioning of our markets, and thus a credible and transparent SRO framework is essential. We support the proposed additions to the OSC's recognition orders which are intended to strengthen the governance of existing organizations or any future SRO. We also strongly support the proposed independent director requirements. Some SRO directors should also be required to have relevant experience with respect to investor protection issues. In addition to ensuring the majority of directors are independent, a cooling-off period prior to being considered independent and requirements for the SRO Chair to be independent, we believe examining the appropriate term limit length for all directors should be a factor. We believe the positions of Chair and CEO of an SRO

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should be held by separate individuals. Other measures could also be taken to enhance the governance structure of SROs, including, as suggested in a position paper released by CFA Institute entitled "Self-Regulation in the Securities Markets – Transitions and New Possibilities"[4], ensuring that SROs are subject to the same transparency and public reporting requirements imposed on primary or statutory regulators. We question the need for the creation of an ombudsperson service for SRO member firms relating to services received from their SRO, and would suggest that this is best handled by way of a member escalation process within the current CSA framework.

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.

Discussion: To reduce regulatory fragmentation and arbitrage, the Taskforce proposes a two-phased approach to the move towards a single SRO further to the CSA-led process to review the structure of SROs in Canada that was recently announced. In the immediate term, the Taskforce proposes to create a new single SRO that regulates both investment dealers and mutual fund dealers. This new single SRO would continue to conduct national market surveillance. It would reduce costs for dually regulated investment dealers and would result in a streamlined approach to enforcement. An underlying principle of the move to the new SRO would be that regulatory oversight must be commensurate with the market participant's size and sophistication. In the longer term, within twelve to eighteen months, the Taskforce proposes to further streamline regulation by transferring oversight of all firms distributing products and providing advice to investors, such as exempt market dealers, portfolio managers and scholarship plan dealers, from the OSC to the new SRO. It would also carry out statutory registration functions on behalf of the OSC for all of these firms, including registration of firms and individuals. A single SRO structure that covers all registered firms providing advice to investors would lead to nonduplicative regulatory oversight, which is essential to healthy and efficient capital markets. The proposed two-phased approach is aimed to minimize disruption to SRO regulated firms while being responsive to the need to streamline regulations for dually regulated firms. The newly created SRO would operate subject to an enhanced accountability framework (as noted in the Taskforce's proposal above). Please provide feedback on the proposed approach and outline any challenges and concerns that may arise from this proposal.

Response*:* We are pleased that a discussion with respect to the future framework of our SROs is underway, which will have input from market participants across the country as a result of the ongoing CSA consultation with respect to the MFDA and IIROC. While many details must be considered in future, in general we would support a merger of the existing two SROs, for some of the reasons noted in the Consultation.

In order to assist with the decision making process, it would be helpful if Ontario could provide data to support the need for the second phase of the proposal to include

[4] *Self-Regulation in the Securities Markets – Transitions and New Possibilities*, online: CFA Institute <https://www.cfainstitute.org/-/media/documents/article/position-paper/self-regulation-in-securities-markets-transitions-new-possibilities.ashx?la=en&hash=2AE04650F1747DD0DD372F1C31EDC6F5C9E79613>

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registrants such as exempt market dealers, portfolio managers and scholarship plan dealers, or alternatively provide a cross-country analysis of other jurisdictions where an SRO has successfully regulated all firms distributing products and providing advice to investors. If there are concerns with how particular SROs are operating, we believe those issues should be identified and addressed directly and independently from a wider proposal that would have wide-ranging impacts on a number of registrants for whom existing regulatory oversight appears to be functioning well.

Specifically, with respect to portfolio managers, a number of Canadian jurisdictions already include a statutory fiduciary duty for these registrants when managing the investment portfolio of a client through discretionary authority granted by that client. As CFA charterholders, we uphold our Code of Ethics and Standards of Professional Conduct, which requires us to put the interests of our clients ahead of our own. We query whether this standard could be watered down (contrary to the public interest) if a single SRO were to absorb regulation of a variety of new registration categories.

In addition, as evidenced by OBSI's latest annual report, portfolio managers do not generate many investor complaints based on their advisory activities. In its 2019 report, OBSI indicated that of the 388 cases opened during its most recent fiscal year, only 14 were opened with respect to portfolio managers (and 1 restricted portfolio manager), as compared to 200 IIROC cases and 138 cases involving MFDA members.[5] Unless there is evidence to the contrary that portfolio managers should be regulated by an SRO, we are concerned that such a disruptive, burdensome, and potentially duplicative change to our regulatory structure would not be justified by the data.

Finally, we question the appropriateness of the more rules-driven regulatory approach of an SRO to the multitude of business models that exist within the exempt-market dealer and portfolio manager registration categories, and with respect to portfolio managers (many of whom also carry investment fund manager registrations) the fit of this more prescribed regulatory approach given the high conduct standards already imposed on this registration category.

2.2 Regulation as a Competitive Advantage

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.

Discussion: The Taskforce proposes that securities issued by a reporting issuer using the accredited investor prospectus exemption should be subject to only a seasoning period. Under the seasoning period, secondary trades are permitted so long as the issuer has been a reporting issuer for four months preceding the trade. Subjecting an issuer to a seasoning period allows them to develop an adequate disclosure record

[5] *OBSI's 2019 annual report*, online: Ombudsman for Banking Services and Investments <https://www.obsi.ca/Modules/News/index.aspx?feedId=c84b06b3-6ed7-4cb8-889e-49501832e911&lang=en&newsId=e244436a-3455-4e90-83a1-37c9e4793409>.

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for secondary investors to rely upon. Allowing stock to become freely tradable so long as the issuer has completed the seasoning period would invigorate the secondary market and provide such issuers with additional capital raising opportunities. Trades over an exchange would be permitted. In order to prevent indirect underwritings to investors who are not accredited, the issuer and any dealer involved in the distribution would be required to take reasonable steps to ensure that the accredited investor (AI) is purchasing as principal and not with a view to further distribution. Such reasonable steps could include representations and warranties in the purchasers' subscription agreements that they are purchasing the securities with investment intent and not with a view to distribution, provided that such representations and warranties are reasonable in the circumstances. In addition, the underwriter registration requirement and registrant obligations would apply to any accredited investor that purchased securities with a view to further distribution. Are there any challenges or concerns that may arise from this proposal? If the holding period is not eliminated, what is the minimum period that would balance the objectives of the holding period and not unduly impede resales? Should this measure be expanded to other prospectus exemptions that currently require a four-month hold? What impact would the elimination or shortening of the holding period have on the willingness of issuers to do prospectus offerings and exempt offerings?

<u>Response</u>: We are supportive of the proposal to remove the four-month hold period for securities issued by a reporting issuer using the accredited investor prospectus exemption. When securities are subject to a four-month hold period, the security is effectively illiquid for that period, which may limit how much of an issue can be purchased by institutional investors, and introduces administrative burden for institutional investors relating to tracking additional restricted securities of the same issuer. Issuers who sell their securities under other circumstances where there is no restricted period would also benefit as they (and their investors) would not need to be able to track the resale of their different securities, potentially easing an administrative burden for smaller issuers and their investors.

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

Discussion: To minimize regulatory burden, the Taskforce is considering changing the requirement for quarterly financial statements to allow for an option for issuers to file semi-annual reporting. What may be the concerns of such proposal? Should the option of semi-annual reporting be made available to only smaller issuers with less significant quarterly operational changes and what should the eligibility criteria for those publishing semi-annual reporting be? If semi-annual reporting is adopted, should issuers using a short form prospectus be required to supplement their financial disclosure if more than a quarter has passed since their most recent financial statements?

<u>Response</u>: While we are mindful of the perceived burden placed on issuers as a result of quarterly financial reporting and support efforts which seek to identify areas of securities legislation that may benefit from a reduction of regulatory burden, we believe that the benefits of additional disclosure for investors far outweigh the burden of preparing such information on issuers. Timely investor access to material, decision-useful information is critical for the proper functioning of markets, and we believe that the

test has not been met or sufficiently evidenced in favour of semi-annual reporting to justify this change. Semi-annual reporting relatively impedes the critical market functions of price discovery and securities valuation. Semi-annual reporting could also put investors at an informational disadvantage from insiders and other substantial security holders. In assessing the ongoing impact of the COVID-19 pandemic on global capital markets, we are again reminded that investors are in constant need of timely, high-quality financial reporting. The regular stream of pandemic-related corporate updates shows the value of the status quo in financial reporting timing in high relief.

A 2019 CFA Institute report entitled "*The Case for Quarterly and Environment, Social and Governance Reporting*"[6] summarized a global member survey and roundtable held to address certain SEC requests for comment relating to periodic disclosure, including the frequency and efficacy of quarterly financial reporting. Based on the responses, the authors concluded that quarterly financial reports were more important to investors than earnings releases, in part because they provided structured information, were subject to accounting standards, included management's discussion and analysis of results, and were certified by officers of the public company. They also updated investors with respect to risks facing a company, and not just earnings. Respondents were not supportive of flexibility in the frequency of periodic reporting, and cited concerns such as a reduction in comparability, decreased transparency and increased complexity. The survey also indicated that a reduction in periodic financial statement production would likely result in an increase in stock price volatility.

We believe there are issues with proposals aimed at reducing financial disclosure for smaller reporting issuers, as it may limit the usability of information for comparison purposes that help make informed investment decisions, disincentivize investors and potentially have an adverse effect on investor protection. We support scaled down disclosure for all reporting issuers to the extent it reduces duplicative information, thereby improving the quality of disclosure. Removing reporting requirements for smaller issuers based on size may have a negative effect, as investors may be disincentivized from directing capital into these smaller companies due to heightened investor risks from asymmetric/non-comparable disclosures and disclosure timing, and as some of these smaller issuers may have less experienced management and less developed financial controls and could benefit from the frequent reporting requirements that currently exist. A scaled down disclosure regime for smaller issuers may also create a dual-regulatory system that many investors are unaware of and add confusion to the marketplace. As smaller issuers compete for the same capital as more senior issuers, it is prudent for investors to be equipped with the same breadth of issuer information in order to allocate capital rationally.

We also query whether moving to a semi-annual financial reporting cycle will disharmonize reporting with issuers who are cross listed on a U.S. or other international exchange and frustrate issuers who regard international investors as important to their businesses, potentially increasing affected issuers' cost of capital in aggregate.

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[6] Mohini Singh, ACA, & Sandra Peters, CPA, CFA, *The Case for Quarterly and Environment, Social and Governance Reporting*, online: CFA Institute <https://www.cfainstitute.org/-/media/documents/survey/financial-reporting-quarterly-and-esg-2019.ashx>

In our view, robust and timely financial reporting clearly feeds investor confidence. A focus on improving the quality of disclosure through plain language, elimination of duplication, streamlining reporting metrics and requirements, and simplification of disclosure exemptions rather than reducing the frequently of reports would better serve investors in the long term and be an effective way to reduce the regulatory burden without compromising investor protection. We would also be supportive of the adoption of disclosure taxonomies/technology such as XBRL, as is increasingly becoming the norm in other developed securities markets globally.

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.

Discussion: To facilitate the greater use of the prospectus system, the Taskforce is proposing liberalizing the ability for reporting issuers to pre-market transactions to institutional accredited investors prior to the filing of a preliminary prospectus. The Taskforce believes that a greater ability to communicate with potential investors to gauge the demand for a public offering would minimize the risk of failed transactions. The greater flexibility should be accompanied by increased monitoring and compliance examinations by regulators of the trading by those who have advance information concerning an offering in order to deter insider trading and tipping. The Taskforce does not propose to make any changes to the bought deal exemption. Do you think that the current prohibition on pre-marketing prospectus offerings continues to serve a useful purpose? If pre-marketing is expanded, should this be accomplished through a change to the prohibition generally or by introducing an exemption? 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? 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?

Response: While we understand that it is common in the U.S. for issuers to "test the waters" prior to commencing a prospectus offering, we are not aware of there being a similar need in Canada where, as noted, most deals proceed as bought deals, with the dealer (or syndicate as applicable) receiving a substantial fee for the risk associated with the resale of the securities to investors. Even in situations where smaller issuers may find it difficult to find underwriters willing to engage in a bought deal as the price spread may be too wide (effective fee too high), they could still consider a concurrent public best-efforts offering and private placement to those institutional investors with whom non-public information concerning the offering was shared, negating the need to "test the waters". Should this proposal proceed, we have significant concerns about the ability to effectively detect and deter insider trading and tipping activity associated with the incremental release of non-public information associated with pre-marketing.

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

Discussion: The Taskforce supports adopting full use of electronic or digital delivery in relation to documents mandated under securities law requirements (i.e., access equals delivery model) and reducing duplicative and unnecessary regulatory burden. The Taskforce suggests that an access equals delivery model could be used for the delivery of documents, including: a prospectus under prospectus offerings by reporting issuers, annual and interim financial statements and related Management Discussion and Analysis (MD&A) of reporting issuers, and the management report of fund performance (MRFP). Please provide feedback regarding which of the above communication and regulatory documents (and suggestions for others) should be made available electronically rather than delivered. 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)? How long should a transition period be if the access equals delivery model is adopted? Are there instances whereby physical delivery of such documents is more well suited? Would the implementation of an access equals delivery model raise any investor protection or investor engagement concerns and what are potential solutions? Should this be extended to issuers in exempt markets? 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? Lastly, what other measures could be pursued to promote the digitization of capital markets? What other reporting requirements could be streamlined in order to benefit capital market participants? Which documents should be required to be electronically delivered and which ones should be posted on the company's website?

Response: We support the use of electronic or other digital delivery for prospectuses, financial statements, MD&A and MRFPs.

The consultation by the CSA currently underway through CSA Consultation Paper 51-405 *Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers* involves a model where delivery would occur when (i) the document is filed on SEDAR and posted to the issuer's website; and (ii) the issuer issues a press release (and files it on SEDAR and on its website) indicating where the document is available and that a paper copy can be obtained upon request. We are of the view that it is critical for the issuer's website to be easy to locate and navigate, as currently the search function available to most investors on SEDAR is difficult to use and does not effectively address this new use-case. Issuers should be required to post the documents prominently on their website in an easily accessible format. The OSC's enforcement powers should specifically extend to issuers that post documents in an obscure manner or in circumstances where they are not posted in a timely and accessible fashion.

We believe a press release, potentially combined with email communication (where beneficial ownership information is available and there has been no opt out of electronic communication) is preferable to expecting security holders to monitor a company's website for each document or communication. As there remain some

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investors with intermittent to no online access, there should be a requirement to provide paper copies of documents upon request at no charge. Subject to ease of use, the same access equals delivery model could be used for financial disclosure of exempt issuers as well, although there may be some issuer concerns with posting private financial information on a website. Non-reporting issuers could potentially make investors aware of the information through electronic communication and post the information on a password-protected site.

To the extent possible, aligning the proposal with access equals delivery models in other jurisdictions may bring some consistency to cross-listed issuers and international investors.

With respect to other documents that could be the subject of this model, as noted in our comments to the CSA consultation, we have concerns about extending the proposal to documents such as rights offering and take-over bid circulars which are time sensitive documents that require security holder action. While some investors may be able to monitor an issuer's website or SEDAR for new information, it remains difficult to locate information for transactions involving new issuers, private issuers, or more than one issuer. It is also less intuitive for investors to know when to look for information and for details about required investor action. The information needed for investors to take reasonable consideration and action for transactions may not reach the intended recipients in time, whether disseminated by news release or posted to an issuer's website.

10. Consolidating reporting and regulatory requirements.

Discussion: The Taskforce supports reducing regulatory burden for companies' reporting requirements to reduce compliance costs where possible, while maintaining investor protection and an appropriate level of disclosure. The Taskforce is considering streamlined reporting and regulatory requirements, including but not limited to: a. Combining the form requirements for the Annual Information Form (AIF), Management's Discussion & Analysis (MD&A) and financial statements b. Simplifying the content of the Business Acquisition Report or revising the significance tests so that BAR requirements apply to fewer significant acquisitions. What are some specific reporting requirements arising from regulatory disclosures as noted above, such as the MD&A and Annual Information Form, that can be removed, consolidated and/or streamlined to reduce duplication and regulatory burden while upholding investor protection?

<u>Response</u>: As noted above, we support removing duplicative reporting requirements for reporting issuers, as well as registrants and investment funds. Regulatory proposals that are disproportionate in their execution costs to their benefits should be subject to further review or rejection.

While not referenced specifically above, we are of the view that there are several disclosure requirements applicable to investment funds that are reporting issuers that can be streamlined to reduce duplication while still upholding investor protection. In particular, public investment funds are required to file Form 81-102F3 – *Contents of Fund Facts Document* for each series of units of each fund, as well as file their simplified prospectus and annual information form on an annual basis. We understand the intent of the Fund Facts document requirement is to ensure in part that investors are provided with point of sale disclosure of key features of a fund, and investors can request a copy of the simplified prospectus and/or annual information form for additional information. However, it may be burdensome for the issuer to include information in the prospectus and annual information form that are already included in the Fund Facts. The OSC may wish to consider, in conjunction with other discussions with CSA members, whether duplicative disclosure can be removed from the prospectus or annual information form if it is already mandated to be provided to investors in the Fund Facts document.

Further, as noted in our comment to the CSA's consultation CSA Notice and Request for Comment *Reducing Regulatory Burden for Investment Fund Issuers – Phase 2, Stage 1,* we would support proposals to consolidate a fund's annual information form into its simplified prospectus for mutual funds in continuous distribution.

As a general comment, prior to proposing new prescriptive rules or disclosure forms, the OSC should clearly explain the regulatory expectations in a transparent fashion and apply any guidance evenly across issuers and registrants.

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

Discussion: The Taskforce proposes that the OSC and TMX allow EMDs to act as "selling group members" in the distribution of securities made under a prospectus offering. The proposal would include CPC offerings, both in relation to initial public offerings and prospectus offerings in connection with a qualified transaction. The Taskforce also proposes that the OSC work with stock exchanges to allow EMDs to act as sponsors in reverse-takeover transactions (RTOs). How would these proposals invigorate the intermediary market? What are the potential benefits and concerns of these proposals?

Response: We support a recommendation to allow EMDs to act as selling group members in the distribution of securities offered under a prospectus. EMDs are currently subject to comprehensive regulation by the CSA and if individual registrants require additional proficiency to distribute freely tradable securities, additional courses and/or training could be made required and available. We believe these proposals would help invigorate the intermediary market, as there appears to currently be an access issue that faces some smaller issuers, where once issuers exhaust their personal network, it can be difficult to find a registrant for smaller raises. We believe that this should be made applicable to all marketplaces, and not limited to those operated by TMX Group.

12. Develop a Well-Known Seasoned Issuer Model.

Discussion: The Taskforce proposes that the Securities Act be amended to allow the OSC to develop a WKSI model in Canada to issue shelf prospectus receipts automatically for issuers that are above a certain public float or have issued debt securities above a set amount in a specified time period and have established an

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appropriate disclosure record. The OSC should also consider implementing additional changes to the shelf prospectus system to provide similar accommodations to those available to WKSIs in the United States. This would streamline the shelf prospectus process for such large issuers who meet the prescribed thresholds and make it more cost-efficient for such issuers to raise capital in Ontario's capital markets. Do commenters view such an WKSI model to be appropriate for Ontario's capital markets? If yes, what should be the appropriate threshold for an issuer's public float and/or debt security offering to qualify for WKSI status?

<u>Response</u>: While this recommendation would result in more cost-efficient capital raises for the largest issuers in Canada, we do have concerns about eliminating the prospectus receipt process. It would be helpful to have more empirical data on the benefit of this model for large issuers, and on the results of the existing prospectus-receipt process, to allow for a more data-driven comparison between the status quo and a potential new process. It would be helpful to know, for example, how often shelf prospectuses result in comments from reviewing staff at the OSC that require the issuer to amend the disclosure, either during the initial review process or during an audit, as well as the significance of any amendments required.

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

Discussion: The Taskforce proposes that the OSC consider adopting a rule that would prohibit market participants and investors that have previously sold short securities of the same type as offered under a prospectus or private placement from acquiring securities under the prospectus or private placements. There are current requirements that could potentially apply to short selling in advance of a prospectus offering or private placements, such as: (i) market participants and investors who have access to material undisclosed information concerning the offering would be precluded from short selling by the insider trading prohibition; (ii) the underwriter registration requirement may apply to market participants and investors who sell short in advance of an offering and fill their short position through the offering, since this is a form of indirect distribution; (iii) insiders of the issuer who enter into securities lending arrangements in connection with short sales prior to an offering would be subject to reporting requirements and such transactions may also be limited by the insider trading prohibition and applicable blackout periods; and (iv) the prohibition on market manipulation may apply to conduct that artificially depresses the price of the securities. However, these requirements will require detailed and contextual analysis. A simple requirement that would prohibit market participants and investors that have previously sold short securities of the same type as offered under a prospectus or through a private placement from acquiring securities would result in greater clarity for all market participants and would be less complicated from both a conduct and compliance perspective. Would such a rule be beneficial in facilitating greater and more effective use of the prospectus or private placement system? When should the period with restricted short selling begin and how long should it extend? Are there any concerns with the operation or oversight of this potential rule? Should there be exceptions to the prohibition, such as for market makers?

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Response: We understand and appreciate the concerns raised above with respect to short selling in advance of a distribution. We note that it is important to keep the primary/prevailing financing mechanism in secondary markets in Canada (bought deals) and the marketed offering/book-building model referenced in Proposal #8 above distinct for the purposes of discussion. Under the bought deal model, investors who short securities prior to an offering do not (or should not) have information concerning the financing and should therefore not be restricted from acquiring securities in the financing. Where such information is held at time of initiating short sales, this is an issue of enforcement for trading on material non-public information. On the other hand, under the marketed offering/book-building model, where an impending financing and a range of potential pricing is publicly communicated to solicit acquirers' intent to purchase securities, it could be appropriate to introduce prohibitions from short-selling securities of the issuer identical to those being offered following the public release, in combination with acquiring securities in the financing. However, this would need to take place prior to the pricing of the offering and allocation of securities to acquirers. This would mirror similar prohibitions in the US market, where the marketed offering model of secondary financings is more common. We are also of the view that monitoring compliance with any such new restrictions enacted without consideration to the secondary financing model undertaken would be a challenge, both on the part of regulators and within large investment managers. We believe that robust application and enforcement of current rules should be sufficient to prevent market manipulation or trading on material undisclosed information. Part of the issue may result from a perceived lack of enforcement rather than concerns with the existing prohibitions.

If such a rule were to be implemented, it will be important to consider appropriate exceptions for market makers to avoid unintentional consequences such as reduced liquidity, further complicating the challenge of compliance monitoring associated with this proposal.

14. Introduce additional Accredited Investor (AI) categories.

Discussion: The Taskforce proposes to expand the AI definition to those individuals who have completed relevant proficiency requirements, such as the Canadian Securities Course Exam; the Exempt Market Products Exam; the CFA Charter or; who have passed the Series 7 Exam and the New Entrants Course Exam (as defined in NI 31-103). If an individual meets the requisite proficiency standard in order to be able to recommend an investment product to other investors, the individual should be able to make a similar investment decision for himself or herself. Adding criteria based on existing educational proficiency would provide greater investment opportunities for individuals who already have the sophistication required for investment decisions and can adequately quantify the risk of potential investments. Would commenters recommend additional expansions to the existing AI definition? If so, which ones?

Response: We support the recommendation to introduce additional AI categories, particularly those based on proficiency through education and professional credentials that indicate a high degree of understanding of investments and markets. If such an alternative were available, the policy rationale would shift to recognize both the ability to withstand loss and / or the ability to understand loss. We believe it is important for regulation to make it easier for small and mid-sized issuers to raise capital in Ontario without compromising investor protection. Given that the public markets are only a capital-raising solution for a subset of issuers, regulatory focus and energy should also be spent on making the private markets easier to navigate for issuers and investors. Part of that focus should be on expanding prospectus exemptions (such as expanding the definition of accredited investor), but also on developing risk-appropriate disclosure requirements, incentivizing issuers to make appropriate regulatory filings and effective and meaningful disclosure to investors, and evolving regulatory requirements to changing technologies and investor communication norms and preferences.

The AI exemption could also be clarified or expanded to look at a group of close individuals as an “investing group”, and include members of a single family (in addition to spouses) or group of related entities (such as related individuals, companies or trusts) as qualifying as an AI under existing asset or income tests in aggregate or by close association. Any AI exemption could be used more widely if there were industry or technological solutions for verifying AI status in a secure way, without having to resort to primary sourced documentation, such as through a commercial AI verification portal or other digital identification/identity solution.

Ontario could also examine expanding the prospectus exemptions in a focused way where specific investing interest exists (e.g. energy, technology, metals/mining) to encourage capital formation for emerging issuers in the sector.

As a broader initiative relating to ease of capital formation, consideration could be given to allowing issuers to engage in capital raising in limited circumstances (by dollar value or number of investors) without requiring a registrant intermediary when trading securities to accredited investors or permitted clients under securities regulation.

15. Expediting the SEDAR+ project.

Discussion: The Taskforce supports the goal of the SEDAR+ project, which would enable greater burden reduction and efficiency, and proposes that it be accelerated. SEDAR+ would modernize the way in which market participants use the centralized system, making it easier to file and access documentation. Given the importance and impact SEDAR+ would have on market participants and their operations, the Taskforce recognizes the need to expedite this project. What priority should be given to the development and launch of SEDAR+? The Taskforce also invites suggestions for further expansions or improvements in relation to SEDAR+ objectives.

Response: We believe the acceleration of the SEDAR+ project should have a very high priority and agree that it is imperative that investors be able to search for and locate disclosure documents far more easily than currently possible without a paid subscription to various commercially-available databases/search technologies. Such improvements are also important to modernize issuers’ engagement with investors, as the current SEDAR and SEDI systems are badly outdated, inferior to their global counterparts and no longer fit for purpose.

It is important that the OSC more quickly embrace emerging technologies and realities for investors such that issuer filings become much more readily accessible to their users. Issuer and registrant supervision should also be digitally enabled and made

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more efficient through more ambitious use of technology. On a larger scale, the OSC and its CSA colleagues could use structured data (i.e. XBRL) as a strategic enabler for both regulation and disclosure as is becoming the norm in an increasing number of developed capital markets globally. The OSC should also examine the use of high-quality non-primary (commercially available) data sources that could satisfy regulatory objectives, and utilize the data it receives directly from registrants and issuers to enhance and empower the information held in the CRR, IFSP and Corporate Finance branches to reduce redundant requests for information from and regulatory burden on the aforementioned registrants and issuers.

Once in place, it may also be possible for regulators to use the improved SEDAR+ systems to analyze public searches for regulatory insights. In the U.S., academic research has supported the use of data mining of issuer filings on EDGAR. In the paper entitled “Search-based peer firms: Aggregating investor perceptions through internet co-searches”[7] , researchers used an algorithm to analyze the page views to identify sets of companies that were being “co-viewed”, presumably by investors to compare firm fundamentals for investment purposes. The researchers concluded that historical EDGAR data was being extracted in a sophisticated manner. They also concluded that by identifying companies in this way, it provided an alternative method of identifying economic benchmarks in lieu of other standards such as industry classifications. As another example, if regulatory staff were to review the number of times a particular type of document was viewed or downloaded from the new SEDAR+ site, over time it could provide important data with respect to the perceived usefulness of those various documents to the public, and potentially assist the CSA in its burden reduction initiatives by identifying infrequently accessed documents, or the type/characteristics associated with the same. If information could be extracted from SEDAR+ in a machine-readable format using industry-standard syntax and/or markup language (including with taxonomic language such as XBRL intact), both the investing public and regulators would be enabled to derive greater benefit from the data.

In addition to concerns about how investors can access issuer information, we believe that regulation and the content of the required disclosure should also be informed by the OSC’s investor behavioural biases research projects, for example with respect to the readability of investor reports.

2.3 Ensuring a Level Playing Field

Promoting Competition

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

Discussion: The Taskforce proposes that the OSC establish a retail private equity investment fund proposal for public input to incorporate private equity investing good practices, and the strengths of the retail investment fund industry. The Taskforce proposes that the OSC examine an established example in other jurisdictions, such as

[7] Charles M.C. Lee, Paul Ma, and Charles C.Y. Wang, “Search-based peer firms: Aggregating investor perceptions through internet co-searches” (2015) 116 Journal of Financial Economics 410.

the Interval Fund concept in the U.S. In mutual funds, investors have the right to redeem on a frequent basis confining mutual funds to invest in liquid investments. In an interval fund, the fund has the control to provide liquidity to investors. Retail investors do not have the right to redeem. An interval fund is a type of closed-end fund that is not listed on an exchange, but periodically (every three, six or twelve months) offers to buy back a stated portion of its shares (typically 5 per cent to 25 per cent) from shareholders. Shareholders are not required to accept these offers. Interval funds are priced daily at net asset value (NAV), but since they are not listed on an exchange, they do not trade above or below NAV. Given the periodic repurchase schedule of an interval fund (as opposed to the daily redemption associated with a conventional mutual fund), portfolio managers can take a longer-term investment view and take advantage of investing in less liquid, potentially higher-return asset classes that may not be suitable for a conventional mutual fund offering daily liquidity. This may enable a portfolio manager to invest in more "private equity" type investments. Do you think this type of fund would provide a meaningful new source of financing for small businesses in Ontario? Should the scope of the investments, or a portion of the investments, for this type of fund be specifically limited to small businesses or expanded to other kinds of businesses? Since these funds would be available to retail investors, are there any specific conditions that should be prescribed to protect investors?

Response: We are supportive of the recommendation to examine the creation a retail private equity investment fund structure to make a subset of private equity investment opportunities more easily available to retail investors. Retail investors are generally under-allocated to alternative asset classes. A number of studies have suggested that the potential for higher, uncorrelated returns can be achieved through investments in private equity over the public markets, while still providing lower volatility and protection in times of market stress.

With the continued decline in companies choosing to go public, there is currently a "grey market" between public and private equity, and it may be difficult for retail investors to truly diversify if they cannot invest in the private markets. If one of the policy goals behind this proposal is to level the playing field and facilitate the participation by retain investors in private equity, the interval fund concept is a good solution, as diversification in smaller/early stage companies and private equity opportunities is key (since investing in these companies and opportunities are generally higher risk both due to likelihood of business failure and liquidity risks).

An analogy could be made to the historic policy behind various labour-sponsored investment funds; Ontario investors were encouraged to invest in early stage companies through tax incentives. Another example of allowing retail investors' access to additional investment opportunities is the CSA's recent expansion of National Instrument 81-102 – *Investment Funds* to include alternative mutual funds.

We believe such a fund structure should be worked into the existing registration and investment fund regulatory structures in Ontario, with registered investment fund managers owing a high standard of care to the fund under section 116 of the *Securities Act*, and with the sale of units of such a fund subject to the high dealing standards to ensure investor protection and minimize the potential for mis-selling.

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19. Improve corporate board diversity.

Discussion: The Taskforce proposes amending securities legislation to require TSX-listed companies to set targets, and annually provide data in relation to the representation of women, black people, indigenous people, and people of colour (BIPOC), on boards and in executive officer positions. What should be the appropriate target for women and BIPOC's on TSX-listed company boards? One suggestion we have heard is 40 per cent women and 20 per cent BIPOC. TSX-listed companies are already required to report on their progress towards achieving any targets, but they should also be required to review and assess the appropriateness of the targets on an annual basis. What timeline should be prescribed for these targets to be achieved, for example, within three to five years? What would commenters think would be ways to increase compliance for companies who do not meet these targets? The Taskforce also proposes to amend securities legislation to require TSX-listed companies to adopt a written policy respecting the director nomination process that expressly addresses the identification of candidates who are women and BIPOC during the nomination process. The Taskforce further proposes to amend securities legislation to set a 10-year maximum tenure limit for directors, with an allowance that 10 per cent of the board can exceed the 10-year maximum for up to two years. This is aimed to encourage an appropriate level of board renewal. The issue of board entrenchment and board renewal is a concern from a governance perspective as continued refreshment of the board helps to ensure that fresh and diverse perspectives and skills are brought into the boardroom. Lastly, the Taskforce recommends that diversity — including racial diversity — be similarly represented at the board and executive level of the OSC who will be responsible for discharging this important mandate. Please provide feedback on the proposal above and identify any challenges or concerns that may arise. Should this requirement be extended to all reporting issuers?

<u>Response</u>: We are strongly supportive of the proposal to require TSX-listed companies (we would suggest expedited expansion to all reporting issuers) to set targets and provide annual data in relation to the representation of women and BIPOC on boards and in executive officer positions. The CAC has made board diversity, gender balance and sound corporate governance a priority. Across the country and internationally, CFA societies and CFA Institute regularly hold diversity-focused and *Women in Investment Management* events and encourage thought leadership in inclusion and diversity with the aim of improving investor outcomes by encouraging diversity in the investment management profession.

We appreciate that diverse boards are likely to improve independence from management, better mitigate conflicts of interest, and ensure that board members are better able to debate a number of positions in complex financial transactions and other activities. We are also convinced that diverse boards lead to greater talent selection, higher quality boards, more purposeful representation and mitigate against groupthink.

As the following quote from an article by Gennaro Bernile, Vineet Bhagwat and Scott Yonker published in the Journal of Financial Economics suggests, diversity in the boardroom can lead to better financial performance:

"we find that greater board diversity leads to lower volatility and better performance. The lower risk levels are largely due to diverse boards adopting more persistent and less risky financial policies. However, consistent with diversity fostering more efficient (real) risk-taking, firms with greater board diversity also invest persistently more in research and development (R&D) and have more efficient innovation processes."[8]

We agree that setting mandatory term limits will encourage an appropriate level of board renewal, but believe that a 10-year maximum term could be too lengthy to help boards achieve the target diversity numbers and the board renewal that the remainder of the proposal seeks to achieve.

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

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.*

Discussion: The Taskforce proposes to introduce a securities regulatory framework for PAFs to ensure that PAFs' institutional clients are provided with the issuer's perspective concurrent with the PAF's recommendation report. The Taskforce proposes providing an issuer with a statutory right to rebut (at no cost) the reports published by PAFs, provided that the issuer published the relevant materials (such as the Management Information Circular) within a specified time period prior to the meeting. This right of rebuttal would apply, with respect to each of the issuer's resolution, when the PAF is recommending to its clients to vote against management's recommendations. The PAF would be required to include the rebuttal in the report it provides to its clients. The Taskforce also proposes a framework that ensures PAFs are not in a conflicted position when providing services to issuers and recommendations to clients by restricting PAFs from providing consulting services to issuers in respect of which PAFs also provide clients with voting recommendations. Please provide feedback on the proposal above and identify any challenges or concerns that may arise. Should the issuer's right of rebuttal be extended to shareholders making proposals, dissidents and parties to transactions for which proxy reports are being distributed? Does the proposal to restrict PAFs to either providing consulting services or making voting recommendations in respect of an issuer appropriately address conflicts of interest?

Response: In general, we query the problem this recommendation seeks to solve. Equally, we query the justification for greater issuer involvement in the contractual relationship between a PAF and its clients. While we have heard of issuers' concerns with potential inaccuracies in PAF reports, we have not seen evidence of pervasive factual inaccuracies and strongly disagree with the proposal to mandate issuer "pre-review" of PAF reports, a "right" to rebut these reports, and mandatory inclusion of these rebuttals in the reports PAFs provide to their paying clients.

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[8] Gennaro Bernile, Vineet Bhagwat & Scott Yonker, "Board diversity, firm risk, and corporate policies" (2018) 127 Journal of Financial Economics 588 at 588.

As a general matter, we believe the proposed requirements would set a disturbing and inappropriate precedent for analyst independence and issuer retaliation. We believe it is contrary to investor protection and infringes on commercial rights to contract between investors and analysts generally, with specific application to PAF in this case but broad potential consequences. Moreover, it violates our professional Code of Conduct relating to conflicts of interest and CFA Institute's Research Objectivity Standards. These Standards stipulate that the most an analyst or firm should provide to the focus of research (being an issuer) is information sufficient to ensure correct factual representation.

Practically, we query whether issuers would have views or information additional to that already contained in the relevant meeting materials. Indeed, issuers should and already do have many avenues (in our view) to effectively rebut proxy advice with which they do not agree. In addition, depending on the timing of disclosure and the type of vote involved, those with information about potential transactions and related resolutions may be behind ethical/information walls and unable to comment on or rebut a report.

Requiring a PAF to incorporate the rebuttal in the report it provides to its clients will substantially increase the costs of providing proxy advisory services – to the particular detriment of smaller PAF firms that bring necessary competition to the PAF marketplace. It will also impact the timeliness of a PAF's final recommendations and the ability for institutional investors to access that independent advice with sufficient time to cast their votes. The proposal also creates the unintended consequence of introducing additional conflicts of interest into the proxy voting process as an issuer is given an opportunity to vet data, analysis, opinions, and recommendations that an investor has paid the PAF to prepare in an independent and objective way. We are also concerned that the proposal would reorient the PAF-client relationship to benefit the issuer.

Considering that management is unlikely to rebut a favourable recommendation, the requirement to include a rebuttal and any additional information from the issuer (and the resulting potential litigation if there is an argument over the methodology used by the PAF) will have a chilling effect on negative vote recommendations. We note that the SEC recently rejected a similar requirement to provide issuers with an advance draft of a PAF report and a mandated rebuttal inclusion.

In most cases, rather than provide issuers with an opportunity to rebut information in the report, it would be preferable that all parties in the corporate governance system be encouraged to engage more meaningfully and transparently with other parties. With respect to PAFs, they could be encouraged to implement practices to promote the transparency and accuracy of their vote recommendations and related data, including where possible by disclosing their approach to reducing inaccuracies. PAFs should (and from what we know – generally do) have frequent communications with issuers on resolutions for which they are forming vote recommendations, to ensure all facts upon which those recommendations are made are understood correctly. Tasking one or more persons at a PAF with such responsibility could help provide accountability throughout the organization and improve transparency.

With respect to a PAF framework to ensure that they are not in a conflicted position when providing services, we do not agree with the proposal to restrict PAFs to providing either consulting services to issuers or voting recommendations to clients with respect to those issuers. Such a position has not been adopted in the U.S., where the SEC has instead accepted robust conflict disclosure as sufficient. We believe transparent and prominent disclosure, together with internal firewalls, are enough to appropriately address conflicts of interest concerns with respect to the objectivity of the advice. We would be generally supportive of proposals that would encourage PAFs (or any other party in the corporate governance system) to improve their transparency and disclosure of conflicts of interest.

Ultimately, proxy voting decisions are made by investors, who are sophisticated and take their proxy voting responsibilities seriously, particularly where a fiduciary duty exists between investment fund managers or portfolio managers and their clients. While many institutional investors routinely follow the advice of their contracted proxy advisory firms, there is implicit discretion to deviate from that advice in appropriate circumstances, presumably including if an unresolvable or unacceptable conflict is present on the part of the PAF, in the ultimate judgement of the investor. Advice from PAFs is but one factor typically used by sophisticated institutional investors that have their own research departments and governance experts involved in their proxy decision making.

Requiring a separation of such functions among the small number of proxy advisory firms might not be commercially feasible for smaller firms (thereby effectively raising barriers to provision of or competition in proxy advice), would disrupt a number of arm's length contractual relationships between proxy advisors and their clients, and cause issues for cross-listed companies with this proposal being a significant deviation from US rules. We strongly believe that the requirements of the recommendation will be stifling to already limited competition in the proxy advisory industry and increase barriers to entry for potential new market entrants.

In conclusion, we believe this proposal to be misguided, with the problem being not properly evidenced to justify the creation of proposed solutions.

Ownership Transparency

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

Discussion: The Taskforce believes that, in an era of increased shareholder activism, the 10 per cent early warning reporting threshold is too high. The Taskforce proposes decreasing the shareholder reporting threshold in Ontario from 10 per cent to 5 per cent. The Taskforce suggests the threshold requirement be revisited to uphold harmonization if further changes are made under the U.S. regulatory framework. The proposal will provide transparency of significant holdings starting at the 5 per cent level so that issuers can more proactively engage with their shareholder base and shareholders can benefit from increased awareness of sizable ownership interests. Are there reasons to exclude certain issuers from the scope of the proposal, such as venture issuers or those below a specified market capitalization? Would requiring "passive" *investors to report ownership at the 5 per cent threshold create undue burden relative to the benefits of disclosure?*

Response: With the general reservations about the net effect of the adoption of this recommendation in combination with other recommendations (as stated in our opening comments) on management accountability and shareholder rights, we generally support the proposal to decrease the shareholder reporting threshold from 10% to 5%, particularly to harmonize the requirement to that under the U.S. regulatory framework and to promote additional market transparency. However, given the incremental burden that the additional required reporting processes would place on investment managers under this proposal, it would be helpful to have a clearer indication of the benefits to investors and the broader market ecosystem of the lower threshold in the Canadian context to ensure that the additional regulatory burden in enacting this proposal will in fact prove beneficial in aggregate. If the change is made, we do not believe there are strong policy reasons to exclude certain issuers from its scope nor do we believe that the contemplated lower threshold would create an undue burden on passive investors (at least relative to any other class of investors), and believe such a distinction between active and passive investors would be inconsistent with similar reporting requirements in other major securities markets.

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

Discussion: The Taskforce proposes to adopt a regime that would require institutional investors (who own above a certain dollar threshold) to disclose their holdings in securities of Canadian reporting issuers (that have a market capitalization above a certain threshold) on a quarterly basis. The process currently in place in the U.S. provides a proven framework for similar disclosure that could work in Canada. Would the proposal provide useful information to issuers and other market participants? What types of exemptions should be provided from the reporting requirement, if any? What would be an appropriate length of lag time before the reporting requirement is in effect?

Response: In order to consider this proposal fully, it would be helpful to have additional information on the perceived benefits of this information in the Canadian marketplace. While we understand that institutional investors are required to disclose their holdings in securities on a quarterly basis pursuant to SEC Form 13F requirements in the U.S, we are unaware of any clearly defined quantitative or qualitative benefits to investors or the capital markets generally. While it is possible that the information could supplement early warning filings and help issuers engage with investors at an earlier stage, we understand that there have been concerns in the U.S. that the information in the forms is unreliable and outdated.[9] In addition, while a benefit to investors could be additional ease in following the trading decisions of professional investors, such activities (particularly if based on outdated or erroneous information) might not be in their best interests, and we generally question the validity of this strategy as a viable investment strategy to generate excess returns. We are not aware that institutional analysts

[9] See Anne Anderson & Paul Brockman, "An Examination of 13F Filings" (2018) 41 Journal of Financial Research 295.

regularly utilize the information found in these reports as a core part of their fundamental investment decisions. While the information could potentially assist dealers in identifying holders of illiquid securities for trading purposes, we understand that there are already technological solutions providing this information to such dealers.

If the requirements are implemented, it will be important to clearly define the application of the requirement and set a threshold for institutional investors' monetary ownership that is sufficiently significant to justify the cost and regulatory burden on institutional investors of implementing such a regime. If enacted, we would not recommend exemptions from the reporting requirements and think a transition period of at least a year would be appropriate and provide institutional investors with enough time to prepare to report or make necessary adjustments to their positions.

It will be critical to follow any changes to the requirements in the U.S. For example, we understand some investors have recommended more frequent filings to address stale dating issues, and that the SEC has recently proposed amendments to the relevant rule to reduce its application such that, if adopted, approximately 4,500 institutional investment managers representing approximately U.S.$2.3 trillion in assets would no longer be subject to the disclosure requirement.

Shareholder Rights

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

Discussion: The Taskforce believes that developments in Canada, such as recently passed amendments to require advisory say on pay votes for CBCA companies, and other jurisdictions, such as the U.K., U.S. and Australia, support the adoption of mandatory annual advisory votes on executive compensation practices for all TSX-listed issuers. The Taskforce recommends against binding votes because of the importance of preserving the board of directors' decision-making processes and to avoid the risk that shareholder proposal campaigns become too burdensome on issuers. Are their concerns with the proposal to require annual advisory say-on-pay votes? Should the proposal be expanded to all reporting issuers?

Response: We are generally supportive of mandatory annual advisory votes on executive compensation practices for all TSX-listed issuers. However, we are aware that some studies are unclear on the effectiveness of such advisory votes.

For example, as noted in an article by Kelly R. Brunarski, T. Colin Campbell and Yvette S. Harman published in the Journal of Corporate Finance:

> "We find that overcompensated managers with low [say on pay (SOP)] support tend to react by increasing dividends, decreasing leverage and increasing corporate investment. However, we find no evidence that management's response to the vote affects … firm value. Finally, we find excess compensation increases for managers that were substantially overpaid prior to the SOP vote, regardless of the outcome of the vote.

> Thus, it does not appear that the SOP legislation has had the intended effect of improving executive contracting".[10]

Another study by Jill E. Fisch, Darius Palia and Steven Davidoff Solomon published in the Harvard Business Law Review stated as follows:

> "the say on pay vote is, to a large extent, say on performance … [raising] questions about the federally-mandated shareholder voting right as a tool for concerns about executive compensation. Say on pay has limited effectiveness if it is only being used to discipline managers who are underperforming or alternatively is not a vote on outsize or inordinate pay as it was intended to be."[11]

We note, however, such a development would accord with global movements toward increased corporate disclosure and best practices and are generally supportive of such efforts and continuing progress towards corporate governance and disclosure best practices.

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).

Discussion: In Ontario, the requirements relating to shareholder proposals are set out in the Business Corporations Act (OBCA). Companies and shareholders must apply to the court to settle disputes. The Taskforce proposes that the OSC be empowered to provide its informal views to issuers seeking to exclude shareholder proposals through a no-action letter. This procedure would provide stakeholders with an efficient means of addressing shareholder proposal disputes while reducing litigation in court. It would also allow for greater streamlining of the shareholder proposal process and screening of immaterial proposals. Please provide feedback on the proposal above and identify any challenges or concerns that may arise. Would the OSC's involvement improve the shareholder proposal process and reduce litigation costs? Should the OSC be involved by giving it a formal role under the OBCA, or by including proposals in securities legislation as done in the U.S.? Are there other areas of the OSC's regulatory oversight that would benefit from the ability to issue a no-action letter?

Response: We are not aware of any current issue in Ontario (or Canada) relating to an excessive number of shareholder proposals being put forth to issuers, and thus are not aware of any problem where issuers unfairly seek to exclude such proposals. The new powers to be granted to the OSC would require an entirely new administrative procedure to be created whereby issuers would need to approach the OSC to provide its views, when we are not aware of many issuers even utilizing the courts for this purpose at this time.

[10] Kelly R Brunarski, T Colin Campbell & Yvette S Harman, "Evidence on the outcome of Say-On-Pay votes: How managers, directors, and shareholders respond" (2015) 30 Journal of Corporate Finance 132 at 132.
[11] Jill E Fisch, Darius Palia & Steven Davidoff Solomon, "Is Say on Pay All About Pay? The Impact of Firm Performance" (2018) 8 Harvard Business Law Review 101 at 101.

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In addition, we are concerned that any such procedure would favour issuers over investors and potentially disempower investors from seeking redress in court in those few situations where such action would be warranted. Shareholder proposals (many of which are non-binding) are a means of communication between shareholders and other shareholders and permit an issuer to gain a sense of the views of a group of shareholders short of dealing with a full-blown proxy fight. The ability to put forth a shareholder proposal in an efficient manner is an important component of effective corporate governance.

As a result, we are not supportive of providing the OSC with powers to provide views to issuers seeking to exclude shareholder proposals and would instead encourage issuers to continue to deal with substantive topics directly with investors.

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

Discussion: The Taskforce proposes to mandate disclosure of material ESG information which is compliant with either the TCFD or SASB recommendations for issuers through regulatory filing requirements of the OSC. Where feasible, the proposed enhanced disclosure will align with the global reporting standards of both TCFD and SASB. In order to give issuers time to effectively meet the disclosure requirements, implementation should be phased, to reflect the capacity and sophistication of smaller and larger issuers. What specific material ESG information is needed beyond what is currently captured by existing disclosure requirements? Should there be a phased approach to implementation, including a comply or-explain model? Is there a need for a short term "safe haven" regarding ESG disclosures? Should ESG disclosures be subject to the forward-looking information requirements set out in National Instrument 51-102 Continuous Disclosure Obligations, or what, if any, different considerations should apply?

Response: We believe additional ESG-related disclosure would be a welcome development for both issuers and investors. The additional disclosure requirements should be aligned with global standards where possible and apply to all reporting issuers, not just TSX-listed issuers. We do not believe it is correct to indicate that the disclosure must be compliant with either the TCFD or SASB recommendations, as these are two distinct frameworks by purpose (TCFD is focused exclusively on climate change and SASB is focused on industry-specific significant ESG issues). As well, SASB identifies industry-level material ESG issues from an investor perspective, thus if only SASB were used some issuer-specific information will be missing. While the requirements of NI 51-102 related to forward-looking information is one set of disclosure to consider, other considerations should be more specific and should be the basis of a separate ESG policy initiative by the CSA.

We note that 2019 CFA Institute report referenced above entitled "*The Case for Quarterly and Environment, Social and Governance Reporting*"[12], the majority of

[12] Mohini Singh, ACA, & Sandra Peters, CPA, CFA, *The Case for Quarterly and Environment, Social and Governance Reporting*, online: CFA Institute <https://www.cfainstitute.org/-/media/documents/survey/financial-reporting-quarterly-and-esg-2019.ashx>.

respondents indicated that there should be a regulatory requirement for ESG and sustainability disclosure, and that regulators should either develop their own standards or support an independent standard setter. The importance of clear definitions and terms and metrics were also mentioned.

In addition to enhancing ESG-related corporate disclosure, in order to further encourage investments from ESG/sustainability-themed funds and investors (both domestic and international), Ontario should encourage sustainable, green and transition bond issuances by Ontario-based issuers through financial or tax incentives for bond verification and trading. The enhanced bond issuance framework should be part of a broader green bond framework that is robust in methodology and implementation (with a competitive eye to other jurisdictions with similar frameworks) and require post-issuance reporting and verification of use of proceeds to encourage capital raising under the framework from more sophisticated ESG-minded investors. In general, supporting the issuance of such securities and encouraging positive underlying ESG/sustainability rating trends for Ontario-based issuers and investment funds can be achieved through more ambitious regulatory guidance and policy making. In addition, Ontario could create a disclosure or certification scheme for investment funds tagged as ESG or sustainable to bring a higher level of rigor to investment fund-related disclosure of ESG-related features.

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.

Discussion: The Taskforce's proposal to facilitate the use of "universal proxy ballots" — a single ballot that lists the director nominees of each side of a dispute and allows a shareholder to vote for a combination of nominees — seeks to provide shareholders who vote by proxy with greater voting flexibility. Mandating disclosure of voting tallies on an ongoing basis to each side in a dispute where universal ballots are used will provide issuers and dissidents with greater transparency. Please provide feedback on the proposal above and identify any challenges or concerns that may arise. Would the proposal help alleviate the inefficiencies and unfairness of the current approach to proxy ballots?

Response: We support the use of a universal proxy ballot to allow shareholders to vote for a combination of nominees, regardless of whether the nominees are proposed by management or another party. It would be useful if the company's proxy ballot and the dissident proxy ballot could be combined into one form such that investors are not confused about which proxy to send in and which would take priority if there were any discrepancies between the two (if two were erroneously completed). Further, we would suggest that universal proxy ballots become the requirement for all contested meetings, and not just those where one party elects to use a universal ballot. We're strongly in favour of mandated voting disclosure and transparency both to each side in a proxy dispute and to investors generally, as vote reconciliation and tabulation problems have been a source of investor confusion and frustration in the past.

Proxy Voting System

29. Introduce rules to prevent over-voting

Discussion: The Taskforce proposes the following rules be introduced to prevent over-voting: 1. An intermediary must not submit proxy votes for a beneficial owner client unless it has confirmed that vote entitlement documentation has been provided to the reporting issuer's meeting tabulator. 2. An intermediary that holds securities on behalf of another intermediary must provide appropriate vote entitlement documentation to the reporting issuer's meeting tabulator to establish its client's vote entitlements. 3. A reporting issuer (or its meeting tabulator) must notify the reporting issuer and any person that submits proxy votes if it rejects or pro-rates those proxy votes because of insufficient vote entitlements. 4. A reporting issuer must obtain the DTC omnibus proxy so that its meeting tabulator can verify the vote entitlements of U.S. intermediaries. These proposals codify best practices found in CSA Staff Notice 54-305 Meeting Vote Reconciliation Protocols. Are there other approaches that the Taskforce should consider to reduce the risk of over-voting?

<u>Response</u>: We remain supportive of regulatory efforts to provide additional information and increase transparency in the capital markets. The proposals set out above will help, in part, to set out further responsibilities for intermediaries, meeting tabulators and reporting issuers in order to enhance accuracy of the vote reconciliation process.

It would be helpful to provide additional direction on how parties can obtain missing vote entitlement information, particularly when securities lending transactions exist (where securities may be held in securities lending pools and margin accounts) thus contributing to inaccurate record keeping in the first instance. Tools such as mandatory reporting of securities financing transactions to a trade repository and the prior consent of clients before the reuse of collateral for voting purposes may help alleviate over-voting issues, as some holders of securities may not fully understand what happens to their voting entitlements once securities are lent out.

In addition, we believe that all key entities involved in the meeting vote reconciliation process should be designated as a "market participant" under applicable securities legislation, in order to provide securities regulatory authorities with greater access to records and enforcement options relating to vote entitlements, tabulation, and reconciliation.

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.

Discussion: The Taskforce proposes the removal of the NOBO/OBO status in Canada and to allow issuers to access the list of all beneficial owners of their securities. This would enable reporting issuers to know more about the true beneficial owners of their securities, and allow issuers to solicit voting instructions directly from such owners. The Taskforce also recommends that an intermediary must also provide the beneficial *owners' email address along with the physical address information currently provided to a reporting issuer that wishes to deliver proxy-related materials electronically and solicit voting instructions from such owners as well. Currently, intermediaries provide NOBO/OBO client account address information to outsourced third party service providers; however, beneficial owners are required to separately consent to receive proxy materials electronically directly from reporting issuers (or their transfer agents), which has resulted in a slow adoption rate for electronic delivery of proxy-related materials. Should reporting issuers be entitled to know who their beneficial owners are? And if so, should beneficial owners be allowed to opt out of being solicited for voting instructions directly by a reporting issuer? If not, are there specific events (i.e., M&A) that should require mandatory disclosures of security positions in reporting issuers? What, if any, are the investor protection concerns with intermediaries providing electronic delivery instructions on behalf of clients delivering proxy-related materials electronically when their investor account address information is already being provided by intermediaries to third parties?*

Response: We believe that further study is required to determine workable alternatives to the NOBO/OBO structure and related processes, and thus do not support the removal of the NOBO/OBO status in Canada at this time. For example, it would be useful to gather data about why investors chose to become OBOs in the first place, and if they understand the limitations of such status and the resulting methods an issuer must use to send proxy materials to their attention. It would also be helpful to get similar information from intermediaries to determine why they advise their clients to choose to become OBOs on account opening forms. Without such information, we are concerned about the potential for issuers to gain additional information directly about investors that have specifically requested to remain somewhat anonymous and not allow the issuer to directly mail proxy materials or solicit voting instructions. If investors are indeed primarily concerned about privacy, there may be technological solutions that would permit issuers to engage with all their investors without breaching privacy requirements, however absent additional data and justification for change it is difficult to know if such a solution is warranted.

2.5 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

Discussion: To spur the growth of innovative companies, the Taskforce proposes the creation of an Ontario Regulatory Sandbox that would have an expanded scope to include new and existing innovative startups operating across the financial services sector in Ontario. Firms would be allowed to test innovative products and business models with a light regulatory touch. The Ontario Regulatory Sandbox would be undertaken jointly by the OSC LaunchPad and the FSRA. There are several entrepreneurial models that are subject to regulatory oversight that overlaps between the OSC and FSRA. In the longer term, the Taskforce proposes an expansion of this Sandbox into a Canadian Super Sandbox in which all provincial and federal financial services regulators allow Canadian financial services businesses to test their innovative ideas. This would spur innovation nationally. Would the creation of an Ontario Regulatory Sandbox and a Canadian Super Sandbox help spur innovative start-ups and *entrepreneurs to grow and raise capital? If so, other than expedited blanket relief orders, what other services/regulatory relief can these sandboxes offer to help businesses raise capital and apply lighter touch regulation to allow these businesses to innovate? What are other ways that the OSC can help foster innovation? What sort of cultural changes would be required at the OSC in order to develop a flexible approach to regulation to foster economic growth and innovation?*

Response: As a first step, we believe the creation of an Ontario Regulatory Sandbox would help spur innovative start-ups and entrepreneurs to grow and raise capital, and thus we are quite supportive of this proposal. In addition to expedited blanket relief orders, these sandboxes can work with issuers to identify where relief is required in the first instance, potentially even prior to the issuer engaging legal counsel. The Regulatory Sandbox could also be a source of information for smaller issuers with respect to the securities regulatory framework in general. Its primary role, however, should be to facilitate rule change in response to insights and innovation rather than provide one-off novel exemptive relief.

It would be helpful to market participants if such a Regulatory Sandbox were open and transparent with respect to the products and models reviewed and its decision-making process, including with respect to those projects which do not move forward or have relief granted. It is also important for the market to have reliable and transparent timelines when “novel” proposals are brought to such a group. Service standards should be readily transparent and updated frequently on a departmental level, and clearly indicated to applicants at the beginning of each interaction to align expectations.

The OSC should build on its record of collaboration with other agencies and market participants. In order to build upon its flexibility, it will need quick access to useful data, including data already collected by market regulation, which can be shared across cross functional working groups including the Regulatory Sandbox, enforcement, and outside agencies like FINTRAC and prudential regulators to facilitate faster decisions. The OSC could also work with provincial and federal privacy counterparts to proactively reach a mutual understanding on initiatives involving personal information and provide guidance to market participants where issues of regulatory concern intersect with privacy concerns.

We believe the OSC should further adopt a “risk based” and “data driven” approach to regulation and adopt a holistic data strategy in collaboration with its CSA partners. To achieve this approach, there might need to be a regulatory shift around the centrality and importance of data for securities regulatory purposes, particularly secondary (non-issuer or registrant collected) data sources, standardized syntax and data structures such as XBRL. We’d also be supportive of the development and adoption of technologies which might allow staff to analyze and review regulatory submissions and applications for insights prior to putting human resources into the analysis.

Another set of changes that could help foster economic growth and innovation would be for staff at the OSC to act as an informational resource to market participants in an expanded way in different contexts. For example, issuers could benefit from interactive content such as videos and webinars hosted on the OSC’s website on

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common capital raising options and registration requirements. Such tools will serve as credible resources and benefit the capital markets ecosystem. As registrants and issuers must expend significant funds on lawyers and compliance efforts, it might be helpful to create a "securities regulatory" helpline with staff from the OSC and potentially other CSA members acting as a central basic resource to small business and their investors. Such an organization that provides consistent advice, answers to FAQs and checklists on basic requirements would be quite helpful to issuers and registrants, and foster a greater culture of compliance expectation-setting and system building between regulators and industry.

32. Requirement for market participants to provide open data.

Discussion: Other global jurisdictions, including the U.K. and E.U., mandate open data to increase competition and promote alternatives to consumers giving them choice, while other jurisdictions, such as Japan, India and Singapore, have promoted data sharing arrangements. The Taskforce proposes that the OSC mandate that capital market participants provide open data so that data sharing arrangements can be further encouraged and facilitate more FinTech solutions for businesses (thereby reducing costs and minimizing duplication of processes) and investors. Greater accessibility to data would assist businesses in providing new products/services and long-term solutions to support innovative business models, but it must be done while ensuring investor protection and privacy of investors are not compromised. Do market participants view open data as an opportunity to innovate and improve business operations? Please identify any concerns or challenges that may arise from this proposal and any corresponding solutions. Do you see a role for the province in setting data protection and privacy standards?

<u>Response</u>: As noted in our response to #31 above, we believe the OSC should adopt a data driven approach to regulation. We view open data as an opportunity to innovate and improve business operations, as well as to empower market participants and investors particularly. There is a strong role for the province in setting data protection and privacy standards and ensuring co-ordination with provincial privacy legislation.

It is important for the OSC to embrace emerging technologies and investor realities such that issuer filings become much more readily accessible for users. Issuer and registrant supervision could also be digitally enabled and made more efficient with technology.

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

Discussion: The Taskforce proposes modernizing the rules so that this early-stage financing of start-ups can be undertaken by angel groups to assist with capital formation. The Taskforce proposes changes to the current registration requirements to enable angel groups to work with their "accredited investor" members to encourage investments in early stage issuers. Please provide feedback on the proposed approach and outline any challenges and concerns that may arise from this proposal. Should this apply to only not-for-profit angel groups? Should changes in registration requirements be by way of regulatory relief (exemption), exemptive relief or through a form of no-action

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letter (as discussed elsewhere in this consultation report) when meeting specific requirements? How can P2P lending frameworks be leveraged to support capital raising of such early stage start-up businesses?

Response: We strongly support measures to support capital raising for start-ups and entrepreneurs, and agree that providing relief from the registration requirements for these groups would help provide market certainty on the difficult question of the registration triggers, as well as encourage further formation of such groups.

We understand there may be significant confusion among market participants with respect to the circumstances in which a group of persons “finding” investments may be considered “in the business” of trading securities and thus required to be registered as a dealer. Once an issuer has exhausted the personal network of its executives, one would expect it to be difficult to raise additional capital without the use of a finder or registrant, the fees for which are typically paid by the issuer. Obtaining the services of a registrant is not always an option for smaller deals (and given the expense, makes a small capital raise unfeasible). Some finders may not themselves be able to register or wish to be subject to ongoing registrant obligations. It is also often the case that deals are introduced to potential investors from other investors in their network, including those that invest in private issues frequently such as single-family offices or ultra-high net worth individuals. There is a risk that such investors might themselves be thought of as “finders” subject to registration, although there is usually no policy rationale for such a conclusion.

As a result, additional clarity with respect to financing amongst a group of accredited investors (often, angel investors) would be helpful to investors making significant capital allocations to the Ontario market. The current cost of using a registrant is not often supported by the amount raised in the issuance and may be discouraging companies from trying to raise capital altogether.

With respect to P2P lending frameworks, while they may be a viable channel to provide investors with an investment alternative, to date individual amounts of such financings would not appear to be enough to satisfy an issuer’s fiscal requirements. Ontario should continue to monitor P2P and crowdfunding platforms globally in order to potentially structure these channels to attract more investment.

2.6 Modernizing Enforcement and Enhancing Investor Protection

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.

Discussion: The proposal to automatically reciprocate sanction orders resulting from the contested hearings and settlements of other Canadian capital market regulators means that such orders would apply in Ontario as if they were made by the OSC, *without a separate OSC order. The Taskforce does not propose to distinguish between orders resulting from breaches of capital markets laws or conduct contrary to the public interest. Automatically reciprocated orders could, among others, impose limitations on or suspension of registration, or limitations on being an officer or director of an issuer. Cease trade orders would also be automatically reciprocated. Orders by courts, foreign regulators, SROs and exchanges would be reciprocated by the OSC on a streamlined basis, without respondents being granted an opportunity to be heard. The proposed changes are predicated on the idea that a fair hearing has already been provided, making an OSC hearing unnecessary. Reciprocated orders or settlements would not have automatic effect in Ontario unless the OSC has the power to make a similar order or settlement. Monetary sanctions or voluntary payments agreed to in a settlement would not be reciprocated. Do commenters think that there are certain types of orders that should be excluded from this proposal and should not be automatically reciprocated or not be reciprocated by the OSC without a requirement to provide a hearing, and, if so, which types of orders? What are the potential concerns with such proposed changes and what safeguards should be put in place to ensure fairness of the process for affected individuals, companies or other entities? For example, the Taskforce is considering requirements such as: the OSC assessing whether foreign jurisdictions offer fair hearings, and if circumstances warrant, permitting a respondent an opportunity to be heard; the publication of all reciprocated orders by OSC; and the OSC providing a clarification right (in lieu of an appeal right) for automatically reciprocated orders.*

Response: We strongly support the imposition of automatically reciprocated sanction orders, particularly when the original hearing or settlement was held in another Canadian jurisdiction and given the fact that most Canadian jurisdictions already have this power. With respect to orders by foreign regulators, the OSC (ideally the CSA) could maintain a list of jurisdictions for which a decision has already been made that those jurisdictions provide fair hearings in accordance with Canadian standards. We support the transparency that the publication of reciprocated orders would provide.

Enhancing Investor Protection

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.

Discussion: The Taskforce proposes creating a regulatory framework that allows for the designation by the OSC of a dispute resolution service, such as OBSI, and makes the dispute resolution service's decisions binding on a registered firm, if the harmed investor accepts the recommendation. The OSC would implement and oversee a comprehensive oversight regime for designated dispute resolution services and ensure necessary changes are made to the designated dispute resolution services' processes to provide procedural fairness for registered firms and investors. The proposal would also require the development by the designated dispute resolution service of an independent internal appeals process. There would be no appeal to the OSC. Parties to a potential judicial review proceeding of an OBSI decision would be the registered firm and OBSI. Such a framework to provide redress to harmed investors, in particular retail *investors that have been harmed and lost an amount too low to consider a court action, would increase investor confidence in the capital markets by assuring that investors are compensated, when warranted, for financial losses that relate to the trading or advising activity of a registered firm. Would commenters think that the proposal to give a designated dispute resolution services organization the power to issue binding decisions is appropriate? Are there other proposals that the Taskforce could consider to ensure retail investors who have been harmed and lost an amount too low to consider a court action are compensated? Do commenters consider OBSI to be suitably equipped to make binding decisions on complex capital markets matters, specifically on exempt market issues? What structural or governance requirements should the OSC impose on OBSI as part of the designation process? What should the maximum binding compensation amount per misconduct potentially imposed on a registered firm be considering that the objective is to provide compensation to retail investors who lost smaller amounts? Would there need to be a mechanism in place to avoid the risk that registered firms may be penalized more than once for the same misconduct if they are required to make a binding payment and are also subject to enforcement proceedings by the OSC or SROs? The Taskforce also proposes a one-time increase of the limit on OBSI's compensation recommendations to $500,000 with subsequent increases every two years based on a cost of living adjustment calculation. For greater certainty, this proposal is separate from the proposal to provide the binding decision-making power to dispute resolution services organizations. Would commenters support such an increase to the limit on compensation recommendations?*

Response: We are strongly supportive of the proposal to give OBSI the power to issue binding decisions. We believe that OBSI has an important role as an independent dispute resolution service and that it helps to foster investor protection and confidence in the Canadian capital markets. It is suitably equipped to make binding decisions on complex capital markets matters, including on exempt market issues, and its process and procedures are functioning well. Similarly, we believe OBSI is well-governed with sound corporate governance processes already in place. OBSI is best positioned to continue as an effective dispute resolution service, especially given the fact that many complaints that are dealt with today by OBSI involve issues of suitability determinations for the exempt market. We understand that complaints also skew toward older investors, and protection of senior and vulnerable clients is a strong focus of the OSC.

We support any concrete measures that can be taken by the OSC to further strengthen OBSI's decision making authority. It is important that OBSI be permitted to share information across regulatory bodies, which will not only assist with investigations but help registrants achieve best practices and potentially reduce regulatory burdens. If supervisory bodies dealing with complaints or other compliance matters worked with the same data set, it could reduce the number of questions and information requests made of the subject of the investigation. Further, consideration should be given to giving OBSI powers to make information public about its investigative findings in aggregate or specifics if it meets a public interest test.

We are not supportive of a development of any framework that results in the fragmentation of dispute resolution services between multiple entities. We are aware of significant deficiencies that have been identified with other (non-OBSI) dispute resolution services with responsibility for non-securities dispute resolution, and are wary of any framework where dispute resolution providers are made to effectively compete for the participation of firms required to engage a dispute resolution service provider.

We are supportive of an internal review process (within OBSI) and believe that it is well-positioned to develop a fair and independent process for adjudication of appeals.

We are strongly **not** supportive of any measure or mechanism to counter the ‘risk’ that registered firms are penalized more than once for ‘the same misconduct’ that may be subject to both a binding payment on the recommendation of OBSI and a fine due to enforcement proceedings by the OSC or SROs. These different channels relate to distinct duties, responsibilities, and potential liabilities under securities law and regulation, and could infringe on investors’ or issuers’ rights to seek relief through the courts and the establishment of civil liability should such a mechanism be created.

Finally, we are supportive of raising the compensation limit to $500,000, with a bi-annual cost-of-living adjustment.

Additional Areas for Consideration

There are a few areas we have considered at great length that we believe could help achieve the goals set out in the Consultation, and we wish to make brief general comments on:

(i) easing regulation for certain registrants, including portfolio managers and investment fund managers;
(ii) easing regulation on certain investment funds in order to encourage funds to see Ontario as a desirable jurisdiction in which to form or sell funds;
(iii) suggestions for cultivating further the OSC’s mandate to provide protection to investors from unfair, improper or fraudulent practices; and
(iv) suggestions for improvements to certain areas of Ontario’s capital markets infrastructure.

Registrant Regulation

As suggested by some of the Taskforce recommendations relating to dealers, registrants play an exceedingly important role in our capital markets. There are a few existing OSC and CSA burden reduction initiatives underway relating to registrants, which we have supported. As a broad principle, regulation respecting registration matters could be reviewed and eased in risk-appropriate circumstances. For example, it should be easier for smaller registrants to share the burdens of a robust compliance infrastructure, by proceeding with the proposed guidance from the CSA to allow multiple smaller registrants to utilize the services of one Chief Compliance Officer (“CCO”), and making it easier for certain CCOs to obtain registration based on alternative experiences and qualifications, ideally without having to apply for expensive and unpredictable exemptive relief.

Principally for new registrants, it is difficult to know at the beginning of a registration application whether an individual’s professional experience will satisfy the registration proficiency requirements. The process for exemptive relief is expensive and

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the outcome difficult to predict. To improve market transparency, the OSC should be required to publish their registration decisions and refusals anonymously, which over time should make registrations timelier and less costly as applicants absorb OSC expectations. All relief requests should be resolved more expeditiously, with clear and transparent staff service standards.

It would also help capital formation in Ontario if the OSC could create a safe-harbour (similar to SEC rules) where certain limited advisory activities (and potentially investment fund management activities) could take place for a limited group of clients by qualified professionals without triggering the registration requirement. Such a safe-harbour (with a bright-line test) would assist with the current market uncertainty with respect to the business trigger test, particularly for small capital raises from a close group of individuals or management of assets for related individuals/entities.

If a complaint or investigation is commenced against a registrant, the conduct in question should be subject to one investigation by one securities regulatory body, with clear timelines and procedures communicated to the greatest degree possible from the outset. Registrants should be able to provide staff at the OSC with meaningful responses and feedback to audit findings to enhance mutual understanding of the registrant's business and regulatory expectations.

If dealers or other registrants could be assigned a representative at the OSC, the individual staff member (or a team of staff members to deal with succession issues) would be able to quickly get to know the registrant's business and work with them to establish best practices and act as a knowledge resource for regulatory expectations.

Investment Fund Regulation

A well-functioning investment fund ecosystem connects investors with several different types of investment opportunities. In order to build on Ontario's history of innovation in the investment fund industry, we would suggest reviewing existing regulation with a view to ensuring it is risk-based. Lower risk investment funds and their managers could receive different treatment than higher-risk activities, managers or business models.

In order to attract international funds to offer securities into Canada (providing even more choice to investors), an examination of the existing investment fund manager registration requirements and exemptions should be undertaken. For example, we understand that currently the international IFM exemption has onerous reporting requirements that include updating the regulators on certain actions of affiliates, which makes it difficult for larger international managers to comply with the exemption (or force them to choose not to offer products into Ontario in the first place). Access to and distribution of foreign-managed funds in Ontario (and reciprocal access to foreign markets for Ontario-managed investment funds) could also be accomplished through streamlined cross-recognition of well-established foreign investment fund regimes, such as Europe's AIFMD and UCITS funds.

Cultivating Investor Protection

In order to continually cultivate a market environment where confidence in the markets and investor protection is at the forefront, we would recommend that Ontario develop a more integrated process for regulatory policy formation, which includes standard setters, professional bodies, issuers and industry groups. Further integration should also be sought between the enforcement branch of the OSC and investigative data and resources across other civil, regulatory and criminal authorities in order to foster efficiency and drive cost synergies.

Legislation and regulation should continue to be reviewed for outdated, redundant or inconsistent provisions, including a review or repeal of the *Commodity Futures Act* (Ontario) and a move to quickly update outdated OTC derivatives regulation. Investors would also benefit from less fragmentation of regulation for products with similar features, such as the current regulation of segregated insurance products by insurance authorities and the regulation of syndicated mortgages by both the OSC and FSRA.

We believe Ontario should continue to examine conflicts of interests, particularly conflicts raised by product embedded commissions, and encourage less conflicted compensation models. The CAC views the current system of financial incentives associated with DSC products as driving sub-optimal behaviour and inherently ridden with irresolvable conflicts. Investors would benefit from a structure of economic incentives that promotes transparent, simple fee structures, full attribution of all costs to the end investor related to their financial advice, and a structure that promotes competition in the distribution of fund products to investors on the basis of product quality and advice, rather than compensation to advisors. As currently contemplated, the DSC commission option for mutual funds in Ontario would be heavily restricted, and further study and consideration should proceed on the possibility of banning them altogether, to help protect investors and harmonize the rules with the other CSA jurisdictions.

Finally, we think certain provisions currently being considered for rules, such as the protection of vulnerable and senior investors suggested in proposed amendments to National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations are important enough to be included in the Securities Act itself.

Capital Markets Infrastructure

We understand that registrants and issuers may be frustrated as a result of the current state of back office infrastructure and clearing, settlement, and custody systems. These systems may be a source of structural barriers or constraints for entrepreneurs in capital markets and investment management. It appears that urgent and significant investment is required to encourage innovation, agility, and competitiveness in these systems and functions when compared with those operating in other countries.

Similarly, a review of Ontario’s onerous trade matching reporting requirements for registrants may be overdue in addition to the current moratorium. One focus could be encouraging adoption of international standards in technology and practices.

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Many of these changes will require the participation of and leadership by industry. In addition to regulatory requirements, changes could potentially be incentivized through the tax system, such as through accelerated depreciation incentives for investments by registrants and service providers like custodians and technology vendors.

Concluding Remarks

We thank you for the opportunity to provide these comments. We would be happy to address any questions you may have and appreciate the time you are taking to consider our points of view. Please feel free to contact us at cac@cfacanada.org on this or any other issue in future.

(Signed) *The Canadian Advocacy Council of*
CFA Societies Canada

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