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BY EMAIL

The Capital Markets Modernization Taskforce
Email: CMM.Taskforce@ontario.ca

Dear Sirs/Mesdames:

Re: Capital Markets Modernization Taskforce Consultation Report

1.1 Introduction and Executive Summary

We are writing in response to the request for comments by the Capital Markets Modernization Taskforce (the **Taskforce**) regarding the proposals identified in the Taskforce's Consultation Report published on July 9, 2020 (the **Report**). In addition to providing our feedback through our written submissions below, our partner Patricia Olasker participated in the Law Firms Roundtable held on June 16, 2020. We also submitted a letter to the Taskforce on June 16, 2020 (the **Initial Taskforce Letter**), which included several proposals that we believe would help to modernize Ontario's capital markets without compromising investor protection. A copy of the Initial Taskforce Letter is attached as Appendix A.

Our comments below address some, but not all, of the areas of focus identified in the Report and are, by necessity, at a high level due to the wide-ranging and general nature of the Taskforce's initiative and several of its proposals. We strongly support initiatives that further establish Ontario as a jurisdiction in which issuers choose to raise capital and investors choose to deploy capital. Although the Report includes several proposals that, at least in principle, may improve and modernize Ontario's capital markets regulatory framework, we are concerned that a number of the proposals would ultimately have an adverse impact on issuers, investors and other markets participants and render Ontario's capital markets less attractive than other advanced capital markets, including the United States.

We understand that the purpose of the Report is to identify and implement proposals that are intended to grow, modernize and improve *Ontario's* capital markets. However, it is critical that any significant changes to securities regulation be made nationally rather than merely provincially. The Canadian securities regulatory landscape is fragmented and it remains unclear if and when the Cooperative Capital Markets Regulatory System will be implemented. Beyond securities laws, further fragmentation exists as a result of different requirements that apply depending on an issuer's governing corporate statute and the stock exchange on which its securities are listed. It is paramount that the Taskforce, the Ministry of Finance and the Ontario Securities Commission (the **OSC**) prioritize harmonization. To

that end, we would strongly caution against the OSC implementing initiatives that would require it to proceed without the support of the other members of the Canadian Securities Administrators (the **CSA**).

We would also encourage the Taskforce, the Ministry of Finance and the OSC to be mindful of the importance of aligning Ontario's rules with those of other advanced capital markets, and particularly the United States, in circumstances where such alignment would be appropriate. Given the relatively small size of our markets, we believe that it is imperative that Ontario minimize regulatory friction points in order to attract issuers and capital to Ontario.

For ease of reference, the following table summarizes our position with respect to each proposal on which we have commented. Please note that this is a summary only and that our views with respect to whether the implementation of a given proposal would ultimately be 'good' or 'bad' for Ontario's capital markets is, in many instances, contingent upon the Taskforce modifying such proposal in accordance with the detailed analysis and recommendations set out below.

Taskforce Proposal	Good	Bad
Proposal #1: Expand the mandate of the OSC to include fostering capital formation and competition in the markets		✗
Proposal #2: Separate regulatory and adjudicative functions at the OSC	✓	
Proposal #5: Mandate that securities issued by a reporting issuer using the accredited investor prospectus exemption should be subject to only a seasoning period		✗
Proposal #6: Streamlining the timing of disclosure (e.g., semi-annual reporting)	✓	
Proposal #7: Introduce an alternative offering model for reporting issuers		✗
Proposal #8: Introduce greater flexibility to permit reporting issuers to gauge interest from institutional investors for participation in a potential offering prior to filing a preliminary prospectus	✓	
Proposal #9: Transitioning towards an access equals delivery model of dissemination of information in the capital markets, and digitization of capital markets	✓	
Proposal #10: Consolidating reporting and regulatory requirements	✓	
Proposal #11: Allow exempt market dealers to participate as selling group members in prospectus offerings and be sponsors of reverse-takeover transactions		✗
Proposal #12: Develop a Well-Known Seasoned Issuer Model	✓	
Proposal #16: Prohibit registrants from benefiting from tying or bundling of capital market and commercial lending services		✗
Proposal #20: Introduce a regulatory framework for proxy advisory firms		✗
Proposal #21: Decrease the ownership threshold for early warning reporting disclosure from 10 to 5 per cent		✗
Proposal #22: Adopt quarterly filing requirements for institutional investors of Canadian companies		✗
Proposal #23: Require TSX-listed issuers to have an annual advisory shareholders' vote on the board's approach to executive compensation		✗

Proposal #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		✗
Proposal #25: Require enhanced disclosure of material environmental, social and governance information, including forward-looking information, for TSX issuers		✗
Proposal #26: Require the use of universal proxy ballots for contested meetings where one party elects to use it and mandate voting disclosure to each side when universal ballots are used	✓	
Proposal #27: Amend securities law to provide additional requirements and guidance on the role of independent directors in conflict of interest transactions	✓	
Proposal #28: Provide the OSC with a broader range of remedies in relation to M&A matters	✓	
Proposal #30: Eliminate NOBO/OBO status, allow issuers to access the list of all beneficial owners of securities and facilitate the electronic delivery of proxy-related materials		✗
Proposal #34: Consider automatically reciprocating orders and settlements from other Canadian regulators and streamlining reciprocation orders in response to other orders		✗
Proposal #35: Improve the OSC's collection of monetary sanctions		✗
Proposal #36: Create a prohibition to effectively deter and prosecute misleading or untrue statements about public companies and attempts to make such statements		✗
Proposal #37: Increase the maximum for administrative monetary penalties to $5 million		✗
Proposal #38: Strengthen investigative tools by empowering OSC Staff to obtain production orders and enhancing compulsion powers		✗
Proposal #39: Greater rights for persons or companies directly affected by an OSC investigation or examination	✓	
Proposal #41: Broaden the confidentiality exceptions available for disclosing an investigation and examination order or a summons	✓	
Proposal #42: Ensure proportionality for responses to OSC investigations	✓	
Proposal #43: Clarify that requiring production of privileged documentation is not allowed	✓	
Proposal #44: Implement OSC procedural change to provide an invitation to discuss OSC Staff's proposed statement of allegations at least 3 weeks before initiating proceedings	✓	
Proposal #45: Promote prompt resolution of OSC enforcement matters by ensuring the confidentiality of dialogue between OSC Staff and parties under investigation	✓	

To facilitate the Taskforce's review, we have structured this letter to conform to the structure of the Report, including with respect to numbering and headings, and have reproduced each proposal on which we have commented in bold followed by our submissions.

2.1 Improving Regulatory Structure

Proposal #1: Expand the mandate of the OSC to include fostering capital formation and competition in the markets

We **do not support** the proposal to expand the OSC's mandate to include fostering capital formation and competition in the markets. In our view: (a) the OSC's mandate is already sufficiently broad to enable it to implement rules and policies to foster capital formation; (b) fostering competition should not be one of the OSC's primary objectives, but should instead be the responsibility of the Competition Bureau and the Ministry of Finance; and (c) expanding the OSC's mandate could upset the balance that the OSC has struck between fair and efficient capital markets on one hand and investor protection on the other.

(a) The OSC's mandate is sufficiently broad to enable it to foster capital formation

The OSC's mandate, which is set out in section 1.1 of the *Securities Act* (Ontario) (the **Act**), is to provide protection to investors from unfair, improper or fraudulent practices, to foster fair and efficient capital markets and confidence in capital markets and to contribute to the stability of the financial system and the reduction of systemic risk. In addition, section 2.1 of the Act identifies seven "fundamental principles" that the OSC must consider in fulfilling its mandate. Those principles include that business and regulatory costs and other restrictions on the business and investment activities of market participants should be proportionate to the significance of the regulatory objectives sought to be realized, and that innovation in Ontario's capital markets should be facilitated. Accordingly, when viewed through the lens of the fundamental principles elucidated in section 2.1 of the Act, the OSC's mandate is already sufficiently broad to provide it with the appropriate degree of authority to implement rules and policies that facilitate capital formation in Ontario's capital markets.

(b) The OSC's mandate should not be expanded to include fostering competition

Notwithstanding that the mandates of regulators in certain other jurisdictions encompass competition, we do not believe that is appropriate for competition to comprise part of the OSC's mandate. Jurisdiction over competition-related issues should be addressed primarily by the Competition Bureau at the federal level and by the Ministry of Finance at the provincial level, as they have the requisite institutional knowledge and political expertise to understand and respond to such issues. Notably, we are not aware of any competitive concerns in Canada's capital markets that would merit regulation. If, in the future, competition-related issues were to impact capital markets participants, the OSC should be invited, together with market participants, to share their respective perspectives and work together with the Competition Bureau and the Ministry of Finance in crafting an appropriate solution. If the Taskforce nevertheless concludes that fostering competition should be explicitly identified in the Act, it would be preferable to incorporate it into section 2.1 of the Act as one new fundamental principle, to be considered and balanced with the others, rather than altering the OSC's mandate.

(c) Expanding the OSC's mandate could upset the balance between fair and efficient markets and investor protection

The OSC is mandated to foster fair and efficient capital markets and to protect investors from unfair, improper and fraudulent practices. Although there are circumstances in which both can be furthered simultaneously, these dual goals can pull in opposite directions. Specifically, some initiatives that enhance investor protection necessarily come at the expense of efficiency in the capital markets. Conversely, some initiatives that enhance market efficiency may be offset by a slight reduction in investor protection. However, the fact that these objectives sometimes oppose one another is positive rather than negative, as this helps to prevent the OSC from straying too far in either direction when crafting rules and policies. It is also important to this balance that both objectives be coloured by the OSC's further mandate to foster confidence in Ontario's capital markets. Expanding the OSC's mandate could have the unintended effect of upsetting this delicate balance and making it more difficult to assess whether, on balance, rules and policies are in the public interest. Even worse, doing so could result in the OSC being compelled to prioritize quantifiable benefits associated with capital markets growth and competition at the expense of unquantifiable, but extremely important, rules that are necessary to protect our capital markets.

Proposal #2: Separate regulatory and adjudicative functions at the OSC

We **strongly support** the proposal to separate the regulatory and adjudicative functions of the OSC. We agree that the current governance structure is an impediment to the OSC's role as a regulator. As long as the adjudicative branch operates within the same organizational structure as the other branches of the OSC, there is a risk of appropriate governance boundaries being blurred and an attendant potential that the integrity and fairness, as well as the *perceived integrity and fairness*, of the adjudicative function are undermined.

The Report asks whether commenters would prefer to see an independent adjudicative tribunal that reports directly to the Minister of Finance, rather than a separate adjudicative tribunal within the current OSC structure where the tribunal would "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." While we accept that the latter option might offer some benefits in terms of efficiency, it is precisely the embedding of OSC staff with the adjudicators and the "collaborative" relationship that creates the perceived issues with the current governance structure. Accordingly, we prefer to see the creation of a fully independent adjudicative tribunal.

The Report also asks whether there are any specific matters (such as mergers and acquisition (**M&A**) hearings) that should not be transferred to an independent adjudicative tribunal, but instead should be "retained by the regulatory side of the OSC." What is intended by this question is not clear to us: Is the Report suggesting that there should be two separate adjudicative functions depending on the type of matter? We would assume that all matters that are presently dealt with by the current adjudicative function of the OSC would be matters handled by the new proposed independent adjudicative tribunal. We do not see any reason for separate adjudicative functions or bodies depending on the nature of the matter. We also believe that the governance concerns that the proposed independent adjudicative

function would be intended to address exist equally with respect to all matters that are currently handled by the adjudicative function of the OSC.

2.2 Regulation as a Competitive Advantage

As a general proposition, it is imperative that Canadian securities regulators continue to implement changes to Canadian securities regulation to ensure that it is modern, innovative, flexible and without unnecessary burden. Per the heading for this section of the Report, regulating in this manner can be a competitive advantage relative to other jurisdictions; moreover, it is the right thing to do to ensure that Canadian capital markets are as efficient and accommodating as possible. Efficient, accommodating markets ultimately benefit all market participants. However, it is paramount that we not introduce changes that degrade the confidence that investors and other market participants have in our capital markets. Some of the proposals in this section of the Report achieve an appropriate balance between efficiency and market confidence, or could achieve that balance with appropriate changes. Others, unfortunately, do not and cannot achieve that balance and, as a result, jeopardize the integrity and confidence in our capital markets without justification. These latter, bad proposals seek to make our markets more attractive simply by subtracting valuable regulation without in any way compensating for the loss of the safeguards that regulation affords to market participants. Ultimately, like any other product or service, making our regulation 'cheaper' does not necessarily make it better for market participants (the 'customer'). To ensure our capital markets continue to have satisfied 'customers', when streamlining our securities regulation and implementing other necessary and laudable burden reduction initiatives, it is critical to still retain the quality controls that serve as the bedrock of securities regulation. Without a solid regulatory foundation, our capital markets will crumble.

This dichotomy between the good and bad proposals of this section of the Report is best demonstrated with three of the four[1] capital raising proposals. A common premise underlying these capital raising proposals is that the Canadian regulatory regime governing secondary market disclosure and liability is sufficient to elicit quality disclosure and police and deter bad disclosure. The WKSI model (Proposal #12) works, in part, for this reason. However, this is not by virtue only of the eligible WKSI issuers' 'seasoning'; it is also supported by their being 'well-known'.[2] Critically, while there is no concurrent regulatory review, the WKSI model is still rooted in the prospectus process. Unfortunately, two of the Report's other capital raising proposals (Proposals #5 and #7) rely exclusively on secondary market disclosure. These two proposals are based on a flawed premise that secondary market disclosure is sufficient in all circumstances, such that neither a prospectus nor a hold period are necessary in order to protect the integrity of the Canadian capital markets where issued securities will become freely-

[1] The fourth capital raising proposal – expanding circumstances in which issuers and their dealers may 'test-the-waters' in advance of a prospectus offering – is clearly within the category of good proposals for the reasons noted below.

[2] An issuer's listing and reporting history alone are not proxies for the currency and quality of its disclosure. This is particularly true for an issuer that did not "go public" with a traditional long-form prospectus and corresponding review (such as an RTO issuer), as its disclosure would not have been subject to the underwriter and regulatory scrutiny of the IPO process. Moreover, for small issuers, 12 months is a relatively short time frame for establishing a record of good disclosure and there is no reason to think it would be sufficient time for an issuer to have achieved a sufficient market following to adequately analyze the issuer and identify red flags. Even with a prior regulatory review (whether by virtue of a prospectus offering or a subsequent continuous disclosure review), and a sufficient reporting history, small issuers are not subject to the market scrutiny to which larger issuers are subject – generally speaking, they do not have the analyst or institutional following necessary to quickly and accurately assess issuer disclosure (particularly very recent developments) and to inform market price.

tradeable. The fundamental flaw with this premise is that the secondary market works only with the prospectus regime as a backbone. The prospectus requirement (and the role that registered investment dealers play in prospectus offerings) are the regulatory cornerstones of capital raising. It is obvious that the prospectus process is beneficial to direct investors participating in the prospectus offering. But perhaps more important to the fabric of our capital markets is the clear (although sometimes indirect) benefit arising from the audit-like function of the prospectus requirement. If applied regularly for a sufficient number of issuers, the prospectus process benefits Canadian capital markets as a whole by providing an assurance as to the quality of secondary market disclosure. This assurance is diminished (with respect to individual issuers and all reporting issuers as a whole) by providing issuers a way to avoid the prospectus process 'audit' indefinitely but still access the Canadian public markets for capital raising.

In this regard, the four-month restricted (or 'hold') period serves a critical role. Generally speaking, it protects our capital markets in two ways:

1. A hold period prevents an 'indirect distribution' to the public that would 'end run' the fundamental objective of the prospectus requirement. Because the original purchaser is not able to freely resell for four months, any resale prior to the end of those four months would be by way of another private placement and may need to be sold at a discount.[3] Accordingly, the initial investor must take principal risk on its investment for a meaningful period of time. This mitigates the risk of 'pump and dump' schemes and other possible frauds on the market, where the initial purchaser is simply a conduit for dumping securities on the market.

2. A hold period also incentivizes the use of a prospectus for distributions, where appropriate, thereby improving disclosure quality and confidence in the market. If privately placed securities are immediately freely-tradeable, and so can be sold without a liquidity discount, then there is little incentive for an issuer to ever use a prospectus. This is a critical concern because the prospectus regime is fundamental to eliciting quality disclosure. In part, this is a function of the "full, true and plain" disclosure requirement applicable to a prospectus; this is a higher standard than is required for continuous disclosure available in the secondary market[4] or for an offering memorandum, if any, provided in the context of a private placement. Equally important is the rigorous vetting process to which a prospectus is subject. The liability provisions applicable to prospectuses ensure that directors and principal officers of an issuer, as well as its experts, are diligent in confirming the quality of the disclosure. In addition, the prospectus is independently

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[3] In theory, this principal risk may also incentivize an investor to apply additional scrutiny in analyzing its investment; however, the extent of this additional scrutiny will vary greatly depending upon, among other things, the sophistication of the investor and the information and other resources available to it.

[4] Real time disclosure of "all material facts" is not required under Canadian securities law governing continuous disclosure; only "material changes" require immediate disclosure in between periodic reporting.

scrutinized through the due diligence of highly qualified underwriters and their counsel, and is subject to review,[5] and a heightened risk of enforcement, by securities regulatory authorities.

As a result, it is critical to clearly distinguish public and exempt offerings to raise capital, the former always being by way of a prospectus and the latter being subject to hold periods so as not to diminish the value of the prospectus regime. Specifically, in order to publicly sell freely-tradeable securities, it should always be necessary for a registered investment dealer to be involved in the offering (except in the case of direct sales that do not require an underwriter), and that the offering be subject to the type of process and disclosure fundamental to a prospectus offering.[6]

That is not to say that only one prospectus model should apply in all circumstances. Developing variations to the prospectus model is important for making our capital markets more efficient. Effective examples are the new and improved rules for "at the market" (**ATM**) offerings and, if implemented, the WKSI model in Proposal #12. Accordingly, instead of marginalizing the prospectus regime, we recommend that Canadian securities regulators continue pursuing burden reduction and modernization initiatives that: (a) better streamline the prospectus process, including through alternative prospectus offering models; and (b) improve on existing exempt market solutions. Our Initial Taskforce Letter includes many recommendations for each. With respect to alternative prospectus models, recent changes to ATM offering rules have afforded many Canadian issuers (both large and small) an avenue for cost-effective, continuous offering that maintains the fundamental features of the prospectus process that are critical to market integrity and investor protection. Likewise, automatic shelf procedures under a made-in-Canada WKSI model would help eligible issuers; however, as noted in our response to Proposal #12, there are other ways to amend the shelf procedures to help all reporting issuers take advantage of shelf efficiencies.

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

We **do not support** the proposal to remove the restricted (or 'hold') period on securities privately placed with accredited investors (the **AI Proposal**). The benefits to the confidence in our capital markets stemming from this four-month restricted period clearly outweigh any objective achieved by its removal. For the reasons noted above, removing a meaningful 'hold' period on any privately placed securities will significantly impair confidence in our capital markets due to a diminished use of the

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5 This benefit is not limited only to circumstances where there is a concurrent review of the prospectus. A prior prospectus review can also elicit better disclosure in the future. For example, the initial regulatory review for an issuer's IPO prospectus can be critical to setting the table for an issuer's future continuous disclosure.

6 While not a perfect solution, it is generally understood that the prospectus requirement is the best solution for ensuring the integrity of capital markets. Public capital raising is the right point in time to subject issuers to the time and cost associated with the vetting necessary to periodically 'audit' the quality of their continuous disclosure through underwriter and regulatory review. In these circumstances, issuers can and should be held to a higher standard because they are raising new capital (so there is a higher risk of fraud) and the proceeds can be used to offset the costs of the process (which are rightfully borne by issuers as they are the direct beneficiaries of the process). While there is always the risk of issuer fraud in the secondary market, the risk is significantly lower than in a primary offering and it is simply not practical to apply a prospectus level of scrutiny to an issuer continuously.

prospectus regime and a diminished role for registered investment dealers and Canadian securities regulators. In addition to degrading the quality of disclosure available to the primary and secondary markets, removing the hold period would also open to the door to more ‘pump and dump’ schemes and other frauds on the market through indirect distributions.

It seems that the objective of the AI Proposal is to improve liquidity in the securities that are privately placed; however, the Report does not identify any issue with the use of a prospectus for this purpose. Instead, the AI Proposal seems premised only on a view that a hold period (and, by extension, any prospectus to qualify the placement) adds no value in circumstances where securities are sold to accredited investors (**AIs**). Clearly, that is not the case. The prospectus regime is designed with a view to allowing securities sold in a treasury (or ‘primary’) offering to become freely-tradeable only where there are appropriate safeguards that preserve the integrity and confidence of our primary and secondary markets. As detailed above, the hold period provides these safeguards. As detailed below, the AI Proposal fails to address the loss of those safeguards; the sophistication of an initial purchaser does not, in any way, obviate the need for them.

Ultimately, the AI Proposal does not further the objective of growing our capital markets. In fact, it would have the exact opposite effect because it would significantly diminish the confidence of participants (both domestic and foreign) in our markets.

(a) The AI Proposal fails to recognize the fundamental benefits of the hold period

In advance of addressing the many issues with the AI Proposal, it is appropriate to first address the flawed argument upon which the AI Proposal is premised. According to the Report, the AI Proposal is premised on the argument that “…given the sophistication and knowledge of clients who qualify as accredited investors, this four-month hold is an unnecessary regulatory burden…”. That argument is fundamentally flawed because it conflates (i) the aforementioned principle, which informs the AI exemption for an initial private placement of securities from treasury, with (ii) the requirements and objectives of the resale regime. The condition of a minimum four-month hold is a resale requirement. This and the other resale requirements have nothing to do with protecting the initial (accredited) investor. As detailed above, they are actually designed to impede resales in order to, among other things, protect purchasers that follow after the initial investor and Canadian capital markets as a whole. Because this protection is critical to confidence in our capital markets, and that benefit outweighs any benefit derived from allowing privately placed securities to be freely-tradeable immediately, there is no validity to the argument in the Report that the manner in which the hold period impedes resale is undue.

(b) The AI Proposal would eliminate the fundamental benefits of a hold period and, as a result, impair confidence in our capital markets

While there are many adverse consequences to eliminating the hold period, the key consequences can be grouped into three categories. The two most significant would be (i) a significant decrease in the proportion of Canadian offerings qualified by a prospectus, and (ii) a diminished role of registered investment dealers in Canadian capital raising. The third key consequence is that it would open the door to more ‘pump and dump’ schemes and other frauds on the market resulting from indirect distributions. In combination, the end result of eliminating the hold period would be significantly less

discipline on issuers with respect to offering documents, if any, used for capital raising, and a corresponding decline in the quality and currency of the continuous disclosure of Canadian issuers that choose not to qualify their offering with a prospectus.

(i) Diminished Use of Prospectuses

While impossible to predict the exact extent to which the AI exemption would supplant the use of a prospectus, it would be significant. Where there is a choice, issuers would inevitably use this private placement exemption in lieu of a prospectus for any post-initial public offering (**IPO**) capital raising because they would obtain the same pricing (as each allow for the immediately freely-tradeable securities) without the corresponding process, disclosure and other requirements of a prospectus.[7] This substitution of private placements for prospectus offerings would pose a serious issue for our capital markets. As detailed above, the rigorous process and complete disclosure mandated by the prospectus requirement is fundamental to eliciting quality disclosure. In turn, this disclosure is critical to the efficient functioning of, and market participants' confidence in, Canadian capital markets; not just for the appropriate pricing for primary offerings, but for secondary trading as well.

(ii) Diminished Role of Investment Dealers

Registered Canadian investment dealers are key players in the prospectus process due to the market and industry expertise they bring to bear as underwriters. Among other things, these qualified underwriters, in collaboration with their legal counsel and other experts, perform rigorous due diligence in order to certify that, to the best of their knowledge, information and belief, the prospectus contains full, true and plain disclosure of all material facts relating to the offered securities as required by applicable Canadian securities legislation.

(iii) Increased Risk of Indirect Distributions and Fraud

For the reasons noted above, absent a prospectus, there will be no independent check on the currency or quality of an issuer's continuous disclosure. Further, if investors are permitted to freely resell without any hold period, there will inevitably be more indirect distributions. Each of these results individually would lead to a significantly higher risk of 'pump and dump' schemes and other frauds perpetrated on the market in connection with capital raisings. Together, that risk increases exponentially. Notably, even just a few 'bad apples' can spoil the integrity of the markets as a whole, particularly where it is clear that it was changes to Canadian securities regulation that paved the way for fraud. If implemented, the AI Proposal would pave the way for much more than just a bushel of bad apples.

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7 Although the universe of AIs is not unlimited, it is a relatively low bar to qualify as an AI, so Canadian issuers could obtain much, if not all, of their post-IPO fundraising from Canadian capital markets through the AI exemption.

(iv) Risks Exacerbated Due to Most Likely Users of Exemption

Worse yet, all of the risks to our capital markets noted above are exacerbated because it will be small issuers that are most likely to substitute use of the AI exemption for what should have been a prospectus offering.[8] These issuers are more likely to have deficient disclosure because they have less time and money to devote to deficiencies in their controls and procedures and few or no analysts and institutional investors that might otherwise police these deficiencies. Ironically, it is these smaller issuers for which good, current disclosure is most critical because they are start-ups or otherwise of a speculative investment quality and their market price is more susceptible to volatility based on real or perceived developments. It is also reasonable to expect a higher risk of fraud with some of these issuers. The most likely investors for these smaller issuers are not significant institutional investors that can (and often do) demand securities be qualified by the more rigorous prospectus process. Instead, it will be individual AIs, who do not have the market power to demand the additional protections afforded by a prospectus process.

(c) The AI Proposal fails to address its adverse impacts

The AI Proposal fails to address its adverse impacts and is not justified by any benefit sought from its implementation.

The AI Proposal fails to address the resulting consequences of a diminished prospectus regime. Notably, no offering memorandum is required to use the AI exemption. While an issuer may voluntarily provide an offering memorandum, there is no requirement that it contain the same level of disclosure provided in a prospectus. Even if a more robust offering document was required, it would not be subject to regulatory review or (if none is otherwise involved in the trade) the independent scrutiny of a qualified registered investment dealer. Nor would that offering memorandum be subject to the stricter liability regime that applies to a prospectus or afford initial investors a ‘cooling-off’ period within which to assess the final offering document and, if unsatisfied, withdraw from their investment.

In addition, the AI Proposal fails to address the inevitable decline in the role of registered investment dealers that would result from fewer prospectus offerings. As proposed, the removal of the hold period would not be conditioned on the involvement of a registered investment dealer (or any dealer, for that matter) in the initial trade. While a meaningful portion of private placements do involve dealers, it is not necessary that these be registered investment dealers. Further, the extent of any underwriter’s due diligence for an offering is, in part, a function of the disclosure in the offering document. Absent a requirement for prospectus-level disclosure in the offering document, an underwriter cannot perform as effectively the same role (in respect of disclosure and due diligence) as it would in a prospectus offering. Critically, initial AIs are in no way a substitute for an underwriter as an effective filter to protect

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[8] Some larger issuers would also use this exemption in connection with their private placements to one or a handful of institutional investors (so-called “PIPEs”). These PIPEs are not the focus of our concerns with the AI Proposal, nor do we think the AI Proposal is necessary to address any liquidity issues with PIPEs. PIPEs are sufficiently rare in Canada and the resale of the securities issued in connection with PIPEs is easily addressed through registration rights where necessary.

the secondary markets. In most cases, these AIs cannot insist on further disclosure or an opportunity to due diligence the investment. Even if they could, there is no assurance that these investors would have the necessary expertise or resources to effectively process the information or the incentive to spend their time and resources for this purpose (in the absence of any requirement that they take principal risk for a meaningful period of time).[9]

Although it attempts to address the heightened risk of an indirect distribution,[10] the AI Proposal also fails on this front. It would be conditioned on the issuer and any dealer involved taking reasonable steps to ensure that the initial (accredited) investor is buying for its own account and not with a view to further distribution. However, this condition fails to mitigate the risk because it is too ambiguous and cannot be policed effectively;[11] absent any real threat of regulatory recourse, what prevents an investor from simply 'ticking the box' to confirm this intention even if it is not true? Further, from a legal perspective, this condition seems to add nothing, as Canadian securities legislation will, in any event, deem anyone "who, as principal, agrees to purchase securities with a view to distribution" to be an

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[9] One might argue that certain significant institutional investors could be an effective filter. While these investors may have the necessary expertise and resources to adequately diligence an issuer and its disclosure, and may even have the leverage required to obtain the access and disclosure necessary for that diligence, it remains an open question as to whether these investors have sufficient incentive to perform the same level of diligence as an underwriter. It is possible that they will in the context of a PIPE, where the investment is significant and may be subject to transfer or other restrictions on liquidity for some period of time. However, in those cases, the investor is basing its investment decision on more than just the issuer's secondary disclosure. Moreover, it is not necessary for securities to be freely-tradeable, as resale is adequately addressed through registration rights. In other cases, significant institutional investors may still be incented to perform a higher degree of independent diligence by virtue of their standing (i.e., they would not want to take the reputational or regulatory risk of being involved in a trade where an issuer's secondary market disclosure may be questionable). However, unless they are making a substantial 'lead' investment and taking extended principal risk on the investment (without hedging away their exposure), it is highly unlikely that these AIs (regardless of their sophistication) will perform a role that is even close to that of an underwriter; the economic and other incentives are simply not sufficient to justify the cost to an investor of extensive due diligence. This cost is more efficiently borne by an underwriter for the benefit of all investors in the financing.

[10] We assume that the 'manner of sale' limitations from National Instrument 45-102 – *Resale of Securities* (**NI 45-102**) would still apply to any first trade (i.e., the requirement that no extraordinary commission be paid in respect of the trade and no unusual effort is made to create demand for the security that is the subject of the trade). However, these are also difficult to enforce and, ultimately, are not effective without any economic risk to the initial purchaser. In our view, the best way to mitigate the risk of an indirect underwriting is through a hold period. Notably, when the SEC reconsidered and revised its Rule 144 conditions to the resale of restricted (i.e., privately placed) securities, it removed its 'manner of sale' limitations but maintained a hold period.

[11] In addition to the issues noted, this condition is also too vague and subjective to work in practice. Further, it is unclear why the issuer and any dealer involved in the offering should be confirming that this condition is satisfied. The onus should be on the investor who is taking advantage of the ability to freely resell; at most, the issuer should be required to provide notice of this condition to an investor. In addition to providing little value, obtaining subscription agreements is impractical in a widely marketed private placement (where they not used) and, more generally, any capital raising requirement that could only be satisfied by obtaining subscription agreements from individual investors runs directly counter to the objective of modernizing our capital markets and streamlining capital raising processes.

underwriter and will deem any trade by an underwriter of securities received in private placement as a distribution that requires a prospectus.[12]

(d) The AI Proposal is out of step with the U.S. approach

In addition to the adverse domestic implications to our capital markets, it is important to consider the adverse effect that the AI Proposal would have on the perspective of investors, analysts, regulators and other market participants outside of Canada. Notably, it would be significantly out of step with the U.S. approach to private placements. Generally speaking, under U.S. rules, there is a six-month hold period on the resale of privately placed ('restricted') securities absent qualification of that resale by a registration statement. This stark contrast in regulatory approaches would necessarily colour (in a very negative and damaging manner) the way that U.S. investors and regulators view Canadian capital markets. A failure in U.S. confidence in our capital markets may disproportionately affect cross-listed Canadian issuers, particularly those that use the U.S. multi-jurisdictional disclosure system (**U.S. MJDS**) for purposes of their U.S. public offerings and to satisfy their U.S. reporting obligations. It may even be cause for the U.S. Securities and Exchange Commission (the **SEC**) to revisit the extent to which U.S. MJDS should be available to Canadian issuers in the future.

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

We **support** the proposal to provide certain, smaller issuers an option to file financial reports on a semi-annual basis. As detailed further below, this should be voluntary (that is, issuers should be able to chose to continue to report on a quarterly basis) and should only be available to smaller issuers where operational changes between quarters are limited. It is in these circumstances where the cost to benefit ratio of quarterly reporting rises to a point where accommodation should be made to permit semi-annual reporting. Such an alternative would remove a significant drain on costs and resources of less capitalized issuers, without a commensurate loss of protection to the integrity of the Canadian capital markets.

In supporting an option for certain, smaller issuers to report on a semi-annual basis, we recognize that the integrity of the Canadian capital markets benefits from maintaining quarterly financial reporting for most issuers. Investors have become accustomed to quarterly reporting, as it is generally required for public issuers in the major economies of North America, South America and Asia. While there is no inherent superiority of quarterly reporting relative to semi-annual reporting beyond the increased frequency of reports (which is evidenced, in part, by semi-annual financial reporting being the standard in Europe, Australia and New Zealand), as a general proposition, more disclosure is preferable to less disclosure, particularly regarding financial matters. However, there is a point where additional disclosure does not result in a benefit that merits the use of additional resources by an issuer.

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[12] See section 2.13 of NI 45-102 and 1.7 of Companion Policy 45-106CP – *Prospectus Exemptions*, which note that an underwriter cannot avoid the requirement to provide a prospectus by using a series of exempt transactions to implement what is in effect an indirect distribution. Dealer registration requirements would also apply.

The point at which the benefit of quarterly financial reporting exceeds the additional cost and time spent by an issuer in preparing such reports occurs where, as the Report suggests, there are less significant operational changes in the issuer's quarterly cycle. However, no real standard for 'less significant operational changes' of an issuer exists, so determining where the balance has tipped in favour of permitting semi-annual reporting necessitates the use of proxies to identify which smaller issuers should be eligible.

As noted above, semi-annual reporting should only be available to smaller issuers. As a starting point, the alternative to report on a semi-annual basis should be limited to 'venture issuers', as that term is defined in Ontario securities laws. Issuers that trade on the larger exchanges or quotation systems, including the Toronto Stock Exchange (the **TSX**) or U.S. markets, should not be able to avail themselves of semi-annual reporting. However, there are issuers with significant market capitalizations that remain venture issuers. To winnow down such issuers from those that should be eligible to use semi-annual reporting, it may be prudent to add a market capitalization test (or, for debt-only issuers, market value of public debt), though such test should be structured to ensure that short-lived fluctuations in pricing of securities from time to time do not affect the availability (or unavailability) of the semi-annual reporting alternative. To properly determine the maximum market capitalization for an issuer that is eligible to use semi-annual reporting, we suggest that an empirical study be conducted to identify what level of market capitalization, if any, provides a good proxy for an issuer having limited operational changes on a quarterly basis. If market capitalization alone fails to separate out the issuers that should be the target of semi-annual reporting 'relief', other metrics, including revenue, may be helpful to isolate those issuers that should be eligible.

Although eligible for semi-annual reporting, issuers that wish to use a short form prospectus should still be required to incorporate quarterly financial reports that they otherwise would have been required to incorporate if they were not eligible under the current prospectus regime. This will maintain the integrity of the short form prospectus system, facilitate comparisons between similar issuers and avoid disputes over whether the standard of full, true and plain disclosure necessitates quarterly reports. Further, to ensure that adoption of such a semi-annual reporting alternative does not result in the SEC questioning whether U.S. MJDS should continue to be available to Canadian issuers, issuers that use U.S. MJDS to satisfy their U.S. reporting obligations should not be permitted to avail themselves of the semi-annual reporting alternative.

Proposal #7: Introduce an alternative offering model for reporting issuers

We **do not support** the proposal for an alternative offering model prospectus exemption for the sale of freely-tradeable listed securities of reporting issuers (the **proposed alternative offering model**). For the reasons noted above, it is critical to market confidence and investor protection that a prospectus be required for capital raising with freely-tradeable securities.

Like the AI Proposal, the proposed alternative offering model would adversely impact confidence in our capital markets due to a diminished use of prospectuses and a diminished role for registered investment dealers and Canadian securities regulators in capital raising. Moreover, it increases the risk of fraud because the issued securities would be freely-tradeable, and of a listed class, and so could

(and in many cases would) be sold immediately, introducing new securities to the public markets without any independent check of the currency or quality of the issuer's disclosure. While the same risk applies with respect to the AI Proposal, these risks are exacerbated in the proposed alternative offering model given the likely investors as well as the smaller issuers for which it is designed.

Ultimately, like the AI Proposal, the proposed alternative offering model does not further the objective of growing our capital markets. Again, it would have the opposite effect of diminishing confidence in our capital markets.

While initiatives to assist smaller issuers with their capital raising are laudable, this cannot come at the cost of the integrity of the market as a whole. The calculus in support of the proposed alternative offering model cannot simply be that, at a small enough deal size, it is too expensive to conduct a prospectus offering and therefore that, at or below that deal size, issuers should be able to simply 'skip' the prospectus process. This fails to factor in the cost to the integrity of our markets and indirect impact on each and every other market participant that is tarnished by bad actors that might take advantage of this 'loophole'. Although the proposed alternative offering model's small annual maximum may limit the risk to the market by dollar amount, a market's reputation is not proportionately impacted by fraud on a dollar-for-dollar basis. A fraud is a fraud regardless of dollar value, and multiple public frauds will cast doubt on the efficacy of the regulation of our markets.

(a) <u>The premise of the proposed alternative offering model is flawed</u>

We understand from the Report that the objective of the proposed alternative offering model is to afford smaller reporting issuers a means for financing without the "high costs associated with preparing and filing a prospectus [that] can prove a barrier to capital raising". In other words, to further foster capital formation by smaller issuers at a lower cost. While not specifically addressed in the Report, we assume the proposal that the issued securities be freely-tradeable is to further this objective by ensuring there is no liquidity discount in pricing the securities that might otherwise apply if issued by way of one of the many other prospectus exemptions available to smaller reporting issuers.

From an initial sale perspective, the proposed alternative offering model would allow an issuer to sell its listed securities (subject to a maximum limit) to anyone, provided that the issuer publicly updates its continuous disclosure record for recent events. In this way, it affords an issuer an unlimited audience of potential investors without regard to their ability to independently assess the investment, much like a prospectus offering *but without the associated process and protections*. From a resale perspective, this shares many of the same features (and, therefore, issues) of the AI Proposal – each proposal allows for the securities to be immediately freely-tradeable, premised only on the assumed quality of the issuer's continuous disclosure.

Whether an initial sale or resale, it seems the rationale for the proposed alternative offering model is that investment decisions can be made exclusively in reliance on a reporting issuer's continuous disclosure record. Implicit in this rationale is that the only value of a short form prospectus is to update an issuer's disclosure record and disclose the terms of an offering. As noted earlier, this premise is flawed, as it fails to attribute the value to both the primary and secondary markets derived from prospectus offerings and their associated process. This is particularly troubling in the context of the

proposed alternative offering model. From a primary offering perspective, in contrast with the AI exemption, the likely investors in these offerings are those that most require prospectus level protections.

Surprisingly, the proposed alternative offering model also fails to directly address any concerns of an indirect distribution resulting from its implementation. Unlike the AI Proposal, where at least some (albeit flawed) consideration is given to this issue, no consideration is provided with respect to this risk with the proposed alternative offering model. While the absolute amounts involved may be significantly less (due to the annual maximum), the likelihood of an indirect distribution and a fraud on the market is significantly higher due to the likely users (both issuer and purchasers) of the proposed alternative offering model.

(b) The proposed alternative offering model fails to balance its objective with the objectives of preserving investor protection and market confidence as a whole

Any anticipated benefits from the proposed alternative offering model are trivial in comparison to the significant damage it would cause to investor protection and confidence in the market as a whole. As noted above, the premise of this proposal is fundamentally flawed because it fails to attribute any value to the prospectus process. As with any capital raising proposal that allows for the sale of freely-tradeable securities without a qualifying prospectus, consideration must always be given as to how significantly it could impair confidence in our capital markets due to a diminished use of the prospectus regime and a diminished role for registered investment dealers and Canadian securities regulators.

For all of the reasons noted above, the prospectus process (including the key role played by registered investment dealers) is critical to market confidence. By providing an ‘end run’ around this process, the proposed alternative offering model introduces all of the same risks to investor protection and market integrity that plague the AI Proposal. In fact, these risks there are exacerbated in the proposed alternative offering model because it is uniquely constructed for use only by smaller issuers[13] for whom good, current disclosure is most critical for an investment decision because these issuers are start-ups or otherwise of a speculative investment quality and their market price is more susceptible to volatility based on real or perceived developments. It is also reasonable to expect a higher risk of fraud with some of these issuers.

Worse yet, in contrast with the AI Proposal, the most likely purchasers under this exemption will be much less sophisticated – namely, ‘mom and pop’ and other retail investors who are more easily misled. Many of these investors are not in any position to protect themselves. Nor are they in any way an effective filter to protect the secondary markets. As noted earlier, this is one of the issues with allowing initial AIs to freely re-sell privately placed shares. This risk is exacerbated in small offerings of smaller issuers because the initial purchaser is even less likely to be a sophisticated investor and inevitably will not be an institutional investor. As a result, this proposal is an even more likely source of ‘pump and dump’ schemes and other frauds on the market.

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[13] There is no reason to think a larger issuer would use this exemption given the annual maximum (which the Report suggests would be small) and the availability of a (now more efficient) ATM procedure, among other things.

When contrasted with the WKSI model in Proposal #9, it becomes apparent just how imbalanced the proposed alternative offering model is. As noted earlier, although both are premised on the 'seasoning' of the relevant issuer, only the WKSI model is supported by an issuer's 'well-known' status (i.e., its marketing following). Moreover, the WKSI model is still rooted in the prospectus process. In contrast, there is no prospectus or equivalent process or disclosure mandated for the proposed alternative offering model despite the more pressing need for safeguards for the most likely issuers and investors.

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

We **strongly support** the introduction of a robust 'testing of the waters' (**TTW**) exemption from the prohibition on pre-marketing that is available in respect of all prospectus qualified offerings. To recognize the interconnectedness of the Canadian capital markets with U.S. markets, a TTW exemption adopted by Canadian securities regulators should, at a minimum, provide the coverage and flexibility of the SEC's recently adopted Rule 163B (which extended the U.S. TTW regime beyond emerging growth companies) and, from a functional perspective, be workable in parallel with the procedures and documentation used by U.S. issuers who take advantage of Rule 163B.

The prohibition on pre-marketing prospectus offerings continues to be one of the foundations of the prospectus system, and limits marketing activities so that prospective investors' reliance will be limited to the process and disclosure mandated by the prospectus system.[14] However, the current prohibition on pre-marketing does not take into account the costs to an issuer of going to market with an unsuccessful deal in terms of resources, costs and reputation. A robust TTW exemption recognizes that these costs are an impediment to the efficient operation of the capital markets and would provide a means for issuers to obtain feedback, including price discovery, from sophisticated investors prior to announcing (and, in the case of a bought deal, pricing) a prospectus offering. Issuers will benefit from better knowledge of pricing ranges prior to agreeing to launch a deal, and will have more certainty regarding how the other parameters of a deal will be received by the market.

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[14] The current prohibition on pre-marketing does not extend to issuers that have a preliminary base shelf prospectus on file once a receipt for that preliminary prospectus has been issued. However, any expansion of the TTW regime should ensure that the same rules apply to issuers that chose to issue securities under a shelf prospectus and those that chose to issue securities under other types of prospectuses. While implementing an expanded TTW process, securities regulators should take the opportunity to fix the quirk in the current shelf prospectus rules that impedes using a 'wall-crossed' (confidential) process to gauge investor interest. Under the shelf rules, an issuer must file marketing materials with securities regulators on or before the date they are first provided to an investor. Such materials become public immediately upon being filed, so confidentiality is no longer possible and the issuer must publicly announce the potential offering (if it is material to the issuer). Accordingly, written materials are not used in these processes in Canada. In this context, making such marketing materials public immediately provides no benefit to the market. To fix this unnecessary limitation, the marketing materials should become public only upon the associated prospectus supplement being filed or the deal being publicly announced, similar to the current regime for bought deals. This approach would have the additional benefit of aligning the Canadian rules with the process as commonly used in the U.S., which be highly beneficial in cross-border offerings.

An expanded TTW regime should limit issuers and their advisors to contacting sophisticated institutional investors to obtain feedback regarding the viability of a potential securities offering. The Report's suggestion to limit potential recipients of TTW solicitations to institutional AIs is a good starting point, though the ultimate standard that is set for such recipients should be sufficiently transparent to dealers so they can easily identify eligible recipients of TTW solicitations. However, in our view, investors eligible for TTW solicitations should be further limited to institutions that are sophisticated. Sophisticated institutional investors will provide better feedback to issuers, leading to superior price discovery, are more likely to have appropriate processes in place to accommodate TTW inquiries and maintain confidentiality and are well aware of applicable insider trading and tipping restrictions applicable to them under securities laws. A properly limited universe of sophisticated institutional investors eligible for TTW solicitations should obviate the need for restrictions on the number of investors contacted in a TTW process.

Limiting the universe of potential investors that may be solicited under the TTW process to sophisticated institutional investors also means that it should not be necessary to mandate that issuers, their representatives and potential investors who are the subject of TTW solicitations enter into confidentiality and standstill agreements.[15] Sophisticated institutional investors are well aware of their obligations under insider trading and tipping provisions of Canadian securities laws and generally have in place the processes and policies to accommodate receiving confidential material information regarding issuers (ethical walls, trading blackouts, etc.). Such investors, even if not regulated entities such as pension funds, trust companies and banks, also have more at risk in terms of sanctions and reputation to incentivize them to strictly comply with securities laws.[16] However, issuers, dealers and potential investors may choose to enter into a confidentiality and standstill agreement. This might be the case to satisfy an issuer's concerns about selective disclosure, an investment dealer's concerns about tipping or a potential investor's concerns about being restricted from trading as a result of having undisclosed material information and wanting the issuer to publicly announce such information within a certain time frame. Confidentiality and standstill agreements are also not necessary where a TTW solicitation would not provide the potential investor with undisclosed material information with respect to the issuer and the fact of the potential offering is not itself material (which is typically the case in debt offerings by larger issuers).

Potential investors' need for an issuer to 'cleanse' any undisclosed material information they receive through a public announcement (so that their trading in such issuer's securities is no longer legally restricted) will provide a natural limit on the length of time prior to an offering in which TTW solicitations may occur. Generally, sophisticated investors will try to minimize the durations of any restrictions on trading that result from participation in a TTW process, so we anticipate that, for issuers that are already public, the TTW process and the announcement of a related offering will occur in a relatively

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[15] We understand that current market practice under Rule 163B is that confidentiality and standstill agreements are generally not used in a TTW solicitation. Instead, investment dealers orally inform the potential investors that the meetings and any information provided is confidential and receive oral acknowledgements from potential investors.

[16] Requiring an investment dealer that makes a TTW solicitation to keep records of the potential investors that are solicited under a TTW process that must be made available to securities regulators on request should be sufficient to ensure that regulators can undertake any heightened monitoring of such investors' trading necessary to alleviate concerns regarding insider trading and tipping associated with an expanded TTW exemption.

short time frame. Sophisticated investors also understand that the issuer's and underwriters' liability will be based on the disclosure in the final prospectus, so no 'cooling off' period should be required between the completion of the TTW process and undertaking a related offering as is the case for the current TTW process in connection with IPOs.

While it is appropriate for the TTW process to be limited to sophisticated institutional investors, any attempt to force a certain percentage of securities in a related public offering to be issued to retail investors should be strongly resisted, as the TTW is an information gathering process and not a selling process. The sale of the securities will be separate and continue to be governed by the normal prospectus rules. Securities laws should not favour allocations of public offerings to any particular investor – this process should be left to market forces.

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

We **strongly support** an "access equals delivery" model to satisfy prospectus and other documentary delivery obligations under Canadian securities laws (an **access model**). An access model is the ideal solution to satisfy prospectus and most other documentary delivery obligations of issuers and dealers under Canadian securities laws, and will complement the transition to a modern securities regulatory scheme by taking into account how market participants actually access and process market information. An access model offers several substantial benefits over the existing physical and electronic alternatives for document delivery and can be accomplished in a manner that does not compromise investor engagement or protection, as immediate access is critical to keep pace in modern capital markets. Canadian investors have the ability to, and do, access documents filed on SEDAR.

Requiring physical delivery of a document to investors is an unnecessary burden given the high level of Internet access in Canada. While electronic delivery (other than by way of access) may also seem on its face to resolve this burden, it does not – it also comes with burden and expense and exposes the delivering party to risk for failed delivery.

We have set out below summary responses to some of the related questions in the Report. For our more detailed views and analysis regarding the potential breadth of an access model to satisfy delivery obligations, and the benefits that would accrue to issuers and investors alike, see our comment letter dated March 5, 2020 (our **Access Model Comment Letter**) in response to CSA Consultation Paper 51-405 – *Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers* (the **Access Model Consultation Paper**). In addition to the many compelling arguments in favour of an access model, the COVID-19 pandemic has made it patently clear that it is not advisable to require paper delivery of any document in any modern regulatory regime.

(a) Physical and electronic delivery are inferior to an access model for delivery

A securities regulatory regime premised on the physical delivery of documents imposes an unnecessary burden on issuers and dealers and fails to realize the obvious benefits of an access model. It also ignores the realities of modern capital markets. The only timely way for an investor to

receive the information necessary to inform its investment decisions is through electronic access. This is critical in almost all follow-on public offerings, where timely participation requires an investor to access SEDAR for the information included in (or incorporated by reference into) the relevant prospectus. However, the need for real-time, electronic access is not exclusive to prospectus offerings. It is also necessary to obtain time sensitive issuer information that informs day-to-day trading in an issuer's securities. This is easy to do where real-time information is easily accessible, at any time and from any device, via the Internet. Material developments are currently disclosed by way of a news release and this information is then pushed to anyone who chooses to follow the issuer. Notably, there is no corresponding requirement for actual delivery of a news release or any corresponding material change report. Clinging to a regime that errantly suggests that investors may confidently invest in the public markets relying on paper delivery and using stale market information is a substantial disservice to the investing public. To invest responsibly in any public securities, investors (with the assistance of their brokers, where applicable) must take a minimum level of responsibility to be and remain engaged with those investments.

Electronic delivery is not an acceptable substitute for an access model because it (i) adds unnecessary time and expense, and (ii) involves unnecessary risk (both legal and technical) for failed delivery, which is a non-issue in an access model. While an electronic delivery model could offer some of the same benefits as an access model, it cannot offer *all* of the same benefits. Critically, even if there were a feasible electronic delivery solution (from both a legal and technical perspective), it would still involve a significant amount of time and expense to establish and maintain 'back-office' processes to effect and monitor the electronic deliveries – requiring more time and expense than an access model without a corresponding benefit. Moreover, there are legal and technical uncertainties to satisfying electronic delivery that make it an impractical and imperfect solution for satisfying delivery obligations imposed under Canadian securities laws. In order to allow issuers and dealers to satisfy their respective delivery obligations exclusively by way of electronic delivery, changes to existing legislation would be necessary. Such changes would not be limited to securities legislation; corporate and other legislation outside the purview of securities regulators would also require changes. Further, even if all of the necessary changes could be implemented such that electronic delivery would not expose issuers or dealers to unacceptable legal risk, electronic delivery still involves technical risks (including the risk of failed delivery due to any number of reasons) that are impossible to plan for and overcome in all instances.

(b) Which documents should be deliverable by way of access?

For the many reasons noted in our Access Model Comment Letter, an access model is particularly well-suited for addressing prospectus delivery obligations.[17] It is also well suited for addressing an issuer's obligations to deliver its financial statements and management's discussion and analysis (**MD&A**) to its investors.[18]

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[17] Access Model Comment Letter at p. 3-4.

[18] Access Model Comment Letter at p. 4.

However, we also believe an access model should be implemented for delivery of proxy-related materials, take-over bid (and corresponding directors') circulars and issuer bid circulars.[19] Issuers would clearly benefit from the cost savings associated with printing and mailing, as would bidders in a take-over bid scenario and shareholders in a contested director election. In that regard, the cost savings alone[20] could potentially enhance shareholder democracy, as more shareholders may be willing to seek to assert their rights and engage in a proxy solicitation campaign.

(c) <u>How should investors be informed that documents are available under an access model?</u>

For delivery of a prospectus, financial statements or MD&A, the access model proposed in the Access Model Consultation Paper should work, subject to the modifications that we proposed in our Access Model Comment Letter.

Although difficult to assess (as no details are provided), the "one-time verification" proposal in the Report would seem to be appropriate only (i) for actual electronic delivery as opposed to an access model (which is to address, among other things, the administrative issues in going back to accounts to obtain such a one-time verification), or (ii) as an alternative to any notice required in an access model. Generally speaking, we think that an investor's participation in Canadian capital markets should be sufficient verification that they will monitor the appropriate channels for disclosure and other required deliveries.

A news release should always be sufficient to alert investors that a deliverable document is available to be accessed; in many cases, it will be more than is necessary. And, in some cases, no notice should be required at all.[21] Taking a 'one-size-fits-all' approach is dangerous. Accordingly, in crafting an effective access model, regulators should not foreclose on alternative methods of notification that are reasonably designed to give notice as to the availability of the relevant document to all of the persons to whom delivery of that document is to be made. More generally, we would caution against any rules implementing an access model that are too prescriptive or not sufficiently flexible to accommodate alternative means for providing notice (if necessary) or posting documents; a prescriptive, inflexible approach risks a result that deemed delivery may not be satisfied due to technological failures (including failures outside the control of the delivering party) or that some of the benefits of an access model may not be realized. As noted in our Access Model Comment Letter, some of these issues can be avoided simply by not requiring an issuer (or dealer) to take actions that are superfluous and otherwise unnecessary to meet the deemed delivery requirement.

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[19] Access Model Comment Letter at p. 9-10.

[20] The costs of printing and mailing alone can run into the millions of dollars.

[21] For example, in the context of a prospectus offering, no news release or other notice should be required for preliminary prospectus documents.

(d) Time frame for implementing an access model

While an access model would be a beneficial alternative for the delivery of various other documents to investors, in our view, the CSA should concentrate its efforts in the near term on implementing an access model that is tailored for prospectuses and financial statements and related MD&A. An access solution for the delivery of these documents will achieve the largest benefit in the shortest possible time period. If initial implementation of an access model will be delayed by virtue of addressing considerations specific to the delivery of financial statements and MD&A, we suggest that the CSA first proceed to implement the access model for prospectus delivery only and then follow with implementation of an access model for the delivery of financial statements and related MD&A.

As detailed in our Access Model Comment Letter, broadening this model to address the delivery of other documents will also be beneficial to the Canadian capital markets in the long run. However, this will entail additional considerations and, possibly, additional or different conditions than those for the access model proposed in the Access Model Consultation Paper. Trying to accommodate delivery of these other documents within the proposed model – which works well for both prospectuses and financial statements and related MD&A with only a few adjustments – would add complication. Effective delivery of proxy materials by way of access will also require changes to corporate legislation. In our view, in order to avoid delaying the implementation of the effective, electronic solution for delivery of prospectuses, financial statements and MD&A proposed in the Access Model Consultation Paper, it would be best to consider options for the electronic delivery of other documents by way of access separately.

(e) Other measures to promote the "digitization" of our capital markets

There are many ways in which our capital markets may be further modernized through "digitization". However, in our view, the most impactful change may be as simple as acknowledging that information is effectively disseminated by filings, website postings and other electronic media. Consistent with the principles that underpin the access model, it is critical that securities regulators explicitly acknowledge that access is sufficient to effectively disseminate material information to the marketplace without the need for a corresponding news release.[22] Ontario (and other Canadian jurisdictions) are significantly out of step with the capital markets of other jurisdictions, which allow their public companies to take advantage of modern means to disseminate material information.[23] At a minimum, the CSA should modernize the guidance in National Policy 51-201 – *Disclosure Standards* (**NP 51-201**) to confirm that a brief, broadly disseminated notice (regardless of the medium) that material information is publicly available (either on SEDAR or on the issuer's website) is sufficient to "generally disclose" that material information. We also recommend that Canadian securities regulators go a step further and provide (in the law, not policy) that public SEDAR filings themselves are sufficient to generally disclose information; this would be consistent with Regulation FD in the U.S., which provides for the disclosure of material information by filing a Form 8-K – no news release is necessary. Canadian stock exchanges should

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[22] See our comment letter dated March 1, 2019 to the OSC in response to the OSC's public consultation for burden reducing initiatives at p. 17.

[23] As an example, since 2013, U.S. reporting companies have been permitted to use social media to disseminate information to the marketplace if the issuer has alerted investors about which social media platform will be used.

also be satisfied that public filings are sufficient for general disclosure. Requiring that a news release be used to generally disseminate material information is an unnecessary burden (because of the advance time necessary to coordinate with the news release service and the cost of using that service) and archaic. Relying on filings to generally disclose information will allow for more real-time dissemination of information (rather than waiting to 'tee up' a news release) without the additional cost.

Proposal #10: Consolidating reporting and regulatory requirements

We **support** the proposal to provide issuers with an option to file a consolidated reporting document (a **CRD**) that combines the requirements of an annual information form (**AIF**), financial statements and MD&A and eliminates duplicative or unnecessary disclosure in these documents, thereby reducing regulatory burden on issuers. We recommend that any streamlining of disclosure in the CRD (or components thereof) as between financial statements and MD&A be applied to quarterly financial statements and MD&A and incorporated in a quarterly CRD. Whether or not securities regulators determine that permitting issuers to file a CRD is advisable in the Canadian capital markets, we **strongly support** the elimination of duplicative or unnecessary disclosure currently required in an AIF, financial statements, MD&A and other mandated filings under Canadian securities laws, including management information circulars (**MICs**).

Examples of disclosure requirements where there is overlap between financial statements and MD&A include disclosure of critical accounting estimates, changes in accounting policies, financial instruments and contractual obligations. Disclosure requirements that could be eliminated from the AIF without compromising the integrity of the Canadian capital markets include information regarding historical market price for securities (broadly available on the internet), directors and officers (available in MICs), legal proceedings and regulatory actions (overlaps with financial statement requirements). In addition, we believe it would be helpful if the separate disclosure requirements relating to risks were consolidated as between the AIF and MD&A.

While we support providing issuers an option to file a CRD, issuers should still have the option to file their AIF and financial statements and MD&A separately. This would accommodate venture issuers that wish to file an AIF (which is optional under the current regime) separately from their financial statements and MD&A if they determine it is advisable to file an AIF after they have filed their financial reports. Also, it would permit issuers to manage their filing requirements associated with the filing of an AIF (which presumably will also be applicable to filing a CRD), some of which require significant work by the issuer.[24] For example, filing an AIF is a 'trigger' for filing technical reports under National Instrument 43-101 – *Standards of Disclosure for Mineral Projects*. The preparation of technical reports is a very lengthy and time consuming process and, as a result, mining issuers will often file their financial statements and MD&A at the time their earnings are announced and subsequently file their AIF (and often closer to the filing deadline) to accommodate the completion of the technical reports. We do not think it would be beneficial to the Canadian capital markets if the adoption of a CRD resulted

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[24] Alternatively, the filing requirements triggered by filing an AIF/CRD could be adapted to permit such flexibility.

in issuers delaying filing of their financial statements and MD&A to accommodate filing requirements currently associated with the AIF.

We **support** the amendments recently adopted by Canadian securities regulators that limit the applicability of the business acquisition report (**BAR**) requirements.[25] However, the BAR filing requirement should be further refined by changing the 'investment test' (the **Investment Test**) as set out in National Instrument 51-102 – *Continuous Disclosure Obligations* (**NI 51-102**) to compare investments in (and advances to) the acquired business to a measure of market capitalization rather than consolidated assets, which is currently the denominator. A similar change was adopted by the SEC in May 2020 to the version of the Investment Test applicable to U.S. public issuers.

The intent of the Investment Test is to provide a relative comparison of fair value. The current Investment Test fails to achieve this objective – while the purchase price for an acquisition will generally be consistent with the fair value of the acquired business at the time of acquisition, the consolidated assets of the issuer may not fully reflect the issuer's current fair value. For example, in the case of acquisitive high growth issuers, market capitalization can be significantly higher than their book value. Using a measure of market capitalization, when available, provides a much better proxy for the issuer's current fair value. Ideally, market capitalization would be calculated at a time proximate to the determination of the acquisition price (to ensure that all information then available regarding the acquiror is captured) and would be calculated on a volume-weighted average price of the acquiror's securities (to eliminate odd results that may arise due to market volatility).

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

We **do not support** permitting exempt market dealers (**EMDs**) to be sponsors of reverse-takeover transactions (**RTOs**). RTOs permit a business to go public using an already publicly traded shell company rather than through the traditional, more onerous IPO process. Under the RTO regime currently in force, an RTO transaction is subject only to review of the stock exchange on which the shell company's securities are listed. This process is widely regarded as involving significantly less regulatory scrutiny than that received from securities regulators in an IPO. As a result, RTOs provide much more limited protection to the integrity of the Canadian capital markets than the full review by securities regulators in connection with an IPO. Further, an RTO does not typically provide the

[25] While only tangentially connected to the BAR requirements, we also recommend that the OSC revisit its interpretation of the requirement to include three years of financial statements for an IPO issuer's primary business (or two years for an IPO venture issuer) in Item 32.1 of Form 41-101F1 – *Information Required in a Prospectus*. In 2015, the OSC published its view that this requirement includes the financial history for all businesses acquired or that will likely be acquired if those businesses are in the same primary business as the issuer, regardless of whether the acquired business(es) were or would be material to the issuer. Instead of using well-established tests of materiality (or 'significance') of the acquisitions, the OSC has adopted a 'catch and release' policy by inviting IPO issuers to engage in pre-filing discussions with staff regarding the financial statements that they believe are required. This overreaching approach is not consistent with the OSC's recent attempt to ensure that regulation is proportionate, consistent and transparent, does not improve disclosure that investors receive and, we understand, is not consistent with the position taken by other CSA members.

safeguards associated with prospectus liability being imposed on directors, officers, selling shareholders and underwriters in an IPO. If the current RTO regime is kept in place, we believe that the additional protections afforded to the market through scrutiny by a more highly regulated (and generally more sophisticated) fully registered dealer is crucial to maintaining the integrity of the Canadian capital markets. Fully registered dealers are closely supervised by the Investment Industry Regulatory Organization of Canada and are generally much more concerned about reputational risk than more lightly regulated EMDs. We believe that it would be detrimental to the Canadian capital markets to permit EMDs, which are only permitted to operate in the exempt (non-public) market, to be able to sponsor a transaction that takes a business public.

Proposal #12: Develop a Well-Known Seasoned Issuer Model

We **strongly support** implementing a WKSI model similar to the 'automatic' shelf registration procedure available under U.S. securities legislation. This would allow specified issuers to qualify (without prior review by any Canadian securities regulator or any other delay) unspecified amounts of different types of securities by way of an 'automatic' shelf. While eligible Canadian issuers can, and often do, take advantage of the current Canadian shelf procedure in order to de-risk the potential for a delay at the time of an offering, an 'automatic' shelf procedure should be more attractive as, among other things, it mitigates adverse pricing pressure from the market overhang associated with a traditional, unallocated shelf.

(a) The WKSI model would work in Canada

In our view, the WKSI model is an appropriate alternative prospectus model for Canada's capital markets. Critical to the success of this model is that eligible issuers must be 'well-known' in that they must have a wide market following (and associated scrutiny) of their reporting by analysts, institutional investors and the financial community in general. This 'well-known' nature of eligible issuers, when coupled with their 'seasoning' from having a reporting track record, provides comfort that an 'automatic' shelf option will not meaningfully diminish the investor protection that would otherwise be afforded from the traditional, prior regulatory review of their shelf prospectus.

While there are a number of metrics that might be used for determining if an issuer is 'well-known', consistent with the U.S. WKSI model, we think market size is the most useful and practical proxy for an issuer's market following. However, in determining eligibility for a Canadian version of the WKSI model, accommodation should be made for the smaller size of Canadian issuers and the fact that more Canadian issuers are closely held relative to their U.S. counterparts. To address the latter concern (closely held Canadian issuers), we suggest that the eligibility threshold be based principally on market capitalization (as opposed to public float). However, we recommend eligibility also be conditioned upon a (smaller) minimum public float to address situations where controlled companies have too small a public float to attract a sufficient market following from analysts and institutions. We defer to the expertise of Canadian dealers in respect of the dollar thresholds sufficient for each. Also, consistent with the U.S. WKSI model, we recommend there be an alternate eligibility threshold for issuers that are 'well-known' by virtue of their publicly traded debt.

(b) Other alternatives that would improve on traditional shelf prospectus model

In addition to implementing a WKSI model, we recommend that regulators consider affording all shelf-eligible issuers the ability to qualify an unspecified amount of securities using a shelf prospectus. While an unspecified amount of securities is one of the features unique to an 'automatic' WKSI shelf prospectus in the U.S., we think it would be appropriate to allow for this generally with respect to any Canadian shelf prospectus regardless of WKSI eligibility. This approach could streamline the Canadian prospectus offering process for smaller Canadian issuers (who do not qualify as a WKSI) that are reluctant to avail themselves of the efficiencies afforded by conducting offerings pursuant to a traditional shelf prospectus due to concerns regarding the associated market overhang. While the absence of 'automatic' qualification of the shelf would make this a considerably less effective solution to addressing market overhang, it may still benefit issuers going forward, after qualifying their shelf, if to have no 'headline number' on their shelf that market participants infer to be the anticipated amount of near-term dilution. Regulators should also consider extending the term of a traditional shelf from 25 months to at least three years.

2.3 Ensuring a Level Playing Field

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

We **do not support** the various proposals restricting the provision of capital market and commercial lending services set out in Proposal #16 of the Report. These proposals range from the unnecessary (e.g., senior officer attestation) to the detrimental (e.g., expanding the independent underwriter requirement) to the radical (e.g., blanket prohibition on registrants providing services to clients of their lending affiliates). No evidence has been provided to support the position that these proposals would promote the efficiency of the Canadian capital markets, that they are necessary to protect the integrity of the Canadian capital markets or that they would enhance competition in the market for advisory services. Adoption of these proposals would result in a radical restructuring of Canadian corporate finance and cause immense disruption as issuers, lenders and investment dealers scramble to realign their businesses to optimize the use and provision of these services. Nor is it clear (nor is any evidence provided) that such realignment would benefit independent (i.e., non-bank owned) investment dealers, seemingly the ultimate goal of the proposals, as the dislocation may simply result in current business being reallocated among Canadian banks and their investment dealer affiliates or driven to U.S. and foreign-based banks and dealers that operate in the Canadian market. As a general proposition, we do not think securities laws should be used to attempt to remedy any perceived 'income inequality' among capital markets participants.

The proposals apparently respond to issues raised by smaller and independent dealers alleging that commercial lenders, through their affiliated broker-dealers, engage in conduct that may impede competition or violate tied selling provisions applicable to banks and registered dealers. If true, appropriate sanctions should be pursued under the *Competition Act,* the *Bank Act* or provisions already contained in Ontario securities legislation, as the case may be, regarding the alleged misbehavior, rather than radically amending securities laws. In our view, additional research must be conducted and empirical evidence collected before even considering whether it is necessary or advisable for securities regulators to proceed with changes that have the potential to result in significant dislocation in the Canadian corporate landscape. Further, prior to any determination to proceed with any such proposals, detailed modelling of the potential ramifications of the proposals for issuers, lenders and investment banks operating in Canada needs to be undertaken.

Our understanding of the interconnectedness of the provision of investment banking services and lending services differs from the process alluded to in the Report. If there is any linkage between underwriting syndicates and lending syndicates, it is caused by issuers allowing investment dealers to participate in an underwriting (a higher margin business) only if that dealer (or its affiliate) is part of the issuer's lending syndicate (a lower margin business). In so doing, an issuer benefits by ensuring that there are sufficient lenders available for its credit facility needs, which is a legitimate business strategy that securities laws should not restrain. We have also observed that investment banking and lending syndicates in other major jurisdictions appear to be similarly linked. We suggest that, prior to embarking on any project to promote 'independent' investment banks in this manner, other jurisdictions

should be canvassed to see whether they similarly promote 'independent' investment banks and, if so, the means by which they do so.

Given the limited evidentiary basis provided for the proposals in general, in our view, the attestation requirement is unnecessary. We are aware of the belief that obtaining attestations from senior executives focusses them on the subject matter of the attestation (in this case, exclusivity arrangements). However, we question the value that attestations provide in circumstances in which legal and regulatory remedies already exist and have not been demonstrated to be insufficient. In this regard, the proposed attestation is wasteful and would be an unnecessary burden on investment dealers, particularly as the proposal would require attestations *each time* a registrant provides capital market services to an issuer with which it, or an affiliate, has a commercial lending relationship. Fully registered dealers are highly regulated and, if deemed a necessary burden, periodic reviews could easily be expanded to audit compliance with existing Ontario securities laws related to tied selling.

Further, there is no reason to believe that issuers are unable to obtain quality advice under the current rules. Our experience is that issuers have relationships with multiple advisors, each of which provides a different perspective. An advisor favouring the interests of an affiliated lender above those of the issuer will be identified quickly in this marketplace of ideas and risks losing the trust (and business) of the issuer. This market-driven discipline results in the provision of 'independent' advice, even by advisors with an affiliate lending relationship. Further, issuers in the Canadian capital markets are generally sophisticated and are well aware of conflicting interests their advisors may have that result from a lending relationship, and can and do account for them when assessing what advice to follow. Issuers are best left to freely choose their advisors from as large a group as possible.

Similarly, we believe that conflicts of interest are generally best addressed through assessment by investors of the relevant facts and circumstances. Accordingly, disclosure should be used to remedy apparent conflicting interests of issuers and registrants. Prospective investors can weigh the relevant facts and come to an independent conclusion regarding whether a relationship is problematic from their perspective in the context of an offering. Only where a relationship between an issuer and a specified firm registrant implicates control should the remedy of an independent underwriter be invoked. On this matter, we think that National Instrument 33-105 – *Underwriting Conflicts* (**NI 33-105**) has struck an appropriate balance between mandating additional disclosure and intrusive regulation (i.e., requiring an independent underwriter). We do not believe that a mere lending relationship should invoke related issuer concerns, as market participants are in the best position to assess whether the relationship is problematic from their perspective. NI 33-105 was designed to address conflicts of interest as between issuers and underwriters insofar as they affect a potential investor in an offering of securities, not to rebalance the allocation of underwriting opportunities among competing investment dealers. Expanding the scope of 'related issuers' to include affiliates of lenders would simply limit the alternatives available to issuers (both lenders and underwriters) and result in no additional protection to prospective investors and no obvious benefit to the Canadian capital markets.

The proposed blanket prohibition on a registrant providing capital markets advisory or underwriting services to an issuer to which an affiliated financial institution is also providing commercial lending services would mark a radical shift from the current competitive market for financial and advisory services in Canada. As noted above, no evidence has been presented to suggest that such a profound

change is necessary or advisable, nor is it clear that such a change would benefit the Canadian capital markets, or even independent dealers. In our estimation, the proposal would simply lessen the willingness of lenders with affiliated dealers to participate in lending syndicates where the issuer also requires more lucrative underwritings or advisory services. This would diminish the lending alternatives available to issuers and reduce competition among lenders, resulting in less credit available to issuers and increased concentration risk at Canadian lending institutions. None of these outcomes would benefit the Canadian capital markets.

We do think that the Canadian capital markets benefit from a strong presence of investment banks that are independent from other Canadian financial institutions. They have historically been the source of innovative approaches to issuers' financing needs and serve the needs of early stage issuers, small- and medium-sized issuers and emerging sectors of the Canadian capital markets. However, the proposals in the Report are based on anecdotal evidence and miss the mark on proportionality between the remedies contained in the proposals and any resulting costs or benefits to the Canadian capital markets.

2.4 Proxy System, Corporate Governance and Mergers & Acquisitions

The introduction to the Proxy System, Corporate Governance and Mergers & Acquisitions section of the Report states that the Taskforce has heard from multiple stakeholders that the current proxy and shareholder voting system reflects an imbalance between activist shareholders and issuers' boards of directors. The Report adds that "[i]ssuers facing activist shareholder campaigns may not always be able to adequately respond effectively due to a lack of transparency in shareholder ownership and voting in Canada."

As a general matter, we agree with the premise that there are imbalances as between issuers' boards of directors, on one hand, and shareholders pursuing activism, on the other. However, in our view: (a) some imbalances unduly favour boards whereas others unduly favour shareholders; (b) the relative balance or imbalance varies in each case; and (c) the notion that the Canadian market is more friendly to so-called 'activists' is not true. One example of an imbalance that favours boards is that, in the context of a contested shareholders' meeting, an issuer has more control over the timing and conduct of its meeting and better access to certain shareholder lists (i.e., U.S. NOBO lists and DTC participant lists) that it may refuse to provide to a shareholder notwithstanding that equal access to such information would facilitate a fair and even-handed voting process. One example of an imbalance that favours shareholders is that a shareholder can solicit proxies in reliance on the 15-shareholder or fewer and public broadcast exemptions, whereas an issuer can only solicit proxies in reliance on an MIC, which can constrain the issuer in its engagement with its shareholder base at an early stage in a contested director election. Accordingly, we submit that the Taskforce, the Ministry of Finance and the OSC should take a nuanced approach that corrects the imbalances on both sides of the scale.

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

We **do not support** the proposal to introduce a regulatory framework for PAFs to provide issuers with a right to "rebut" PAF reports or to restrict PAFs from providing consulting services to issuers in respect of which PAFs also provide clients with voting recommendations. PAFs have a significant impact on corporate governance issues and transformative transactions. They can influence both institutional and retail investors through their recommendations to clients and, frequently, the subsequent publication of those recommendations in the media. We understand that some issuers believe that the facts on which PAFs rely can be incorrect, that the analysis and recommendations provided by PAFs can be flawed and that the processes by which such recommendations are formulated may not be sufficiently transparent. Conversely, we understand that many institutional investors believe that PAFs offer a valuable service that helps them to discharge their responsibilities to their clients and beneficiaries and do not generally perceive a systemic problem with the quality of PAFs' recommendations.

In our view, modifying the current regulatory approach to PAFs is unnecessary. In this regard, we note that: (a) the regulation of PAFs was recently and extensively considered by the CSA; (b) there is a lack of evidence that the current regulatory approach to PAFs is problematic; and (c) providing issuers with a right to rebut a PAF's report would not be impactful. Moreover, recent developments in the U.S.

leading up and in response to the SEC's adoption of rules relating to PAFs and their advice remains in a state of great upheaval, including pending litigation, the outcome of which should be known and considered before Canada's securities regulators investigate whether further regulation of PAFs is necessary or appropriate.

(a) The regulation of PAFs was recently and extensively considered by the CSA

The CSA recently engaged in an extensive consultation process regarding the potential regulation of PAFs. On June 1, 2012, the CSA published for comment Consultation Paper 25-401 – *Potential Regulation of Proxy Advisory Firms*. The stated purpose of the consultation paper was to provide a forum for discussion of certain concerns raised about the services provided by PAFs and the potential impact on the Canadian capital markets, and to determine if and how these concerns should be addressed by the CSA. The CSA received 62 comment letters from various market participants. Based on the comments received, the CSA concluded that a regulatory response was warranted. On April 24, 2014, the CSA published proposed National Policy 25-201 – *Guidance for Proxy Advisory Firms* (**NP 25-201**) for further comment, in which it suggested a policy-based approach to address the potential concerns with PAFs. Once again, the public consultation process was robust; the CSA received an additional 58 comment letters from market participants. After careful consideration, the CSA elected to publish NP 25-201, setting out a list of guidelines or best practices that PAFs are encouraged to follow and which foster greater transparency in PAFs' decision-making and trust between PAFs and other market participants. The fact that the CSA deliberately chose not implement prescriptive rules to regulate PAFs following such extensive consultation should not be overlooked or ignored.

(b) There is a lack of evidence that the current regulatory approach to PAFs is problematic

The purpose of NP 25-201 is to (i) promote transparency in the processes leading to a vote recommendation and the development of proxy voting guidelines, and (ii) foster understanding among market participants about the activities of PAFs. NP 25-201 is neither prescriptive nor exhaustive, but it does outline various ways in which PAFs can address actual or potential conflicts of interest. It also sets out the CSA's expectation that a PAF should provide sufficient information to enable clients to understand the nature and scope of any conflict so that they can assess the independence and objectivity of the PAF and its services, including any steps taken to address the conflict.

It is unclear from the Report whether or how the Taskforce concluded that PAFs' processes of identifying, managing and disclosing potential conflicts inadequately addresses issues regarding conflicts of interest. Absent an empirical study evidencing specific and significant problems with the existing regime, we believe that the CSA's decision to provide guidance rather than enact prescriptive requirements – a decision that the CSA made after careful consideration over a nearly three-year period – warrants deference. We also note that, if PAFs are conflicted out of providing voting recommendations where they have also provided consulting services, there is a risk that many issuers in Canada's capital markets would cease to be covered by any PAFs, which could disenfranchise shareholders that rely on the valuable guidance that they provide. Alternatively, such a proposal could result in PAFs no longer being able to provide consulting services to numerous issuers, which could

diminish the quality of issuers' corporate governance practices to the detriment of those issuers' shareholders in particular and the Canadian capital markets in general.

(c) Providing issuers with a right to rebut a PAF's report would not be impactful

We do not believe that providing issuers with an opportunity to rebut a PAF's report would be impactful. Among other things, NP 25-201 encourages PAFs to disclose whether they provide drafts of their reports to issuers for review and comment before sending the final reports to their clients. In our experience, Institutional Shareholder Services Inc. (**ISS**), the leading PAF, already does just that, such that issuers already have a chance to review and comment on reports and identify deficiencies or errors that should be corrected. Moreover, in practice, issuers generally craft rebuttals that they are then free to disclose publicly, either in a press release or through other media outlets, providing the market with the issuer's perspective concerning the PAF's voting recommendation. It is also unlikely that an investor that relies on a PAF's reports and recommendations will change its opinion or its vote because an issuer's rebuttal is included in the report itself rather than in a separate press release or news article. We also understand that, over the past few years, many institutional investors have shifted away from automatically following the advice or recommendations of PAFs and conduct their own evaluations and consider their internal proxy voting policies in making their voting decisions, particularly in the case of high stakes voting decisions in contested elections and transformative transactions, which suggests that the influence of PAFs is on the decline, rather than on the rise.

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

We **do not support** the proposal to reduce the early warning reporting threshold from 10% to 5%. Such a reduction would stifle shareholder engagement and unduly restrict the ability of shareholders to have a positive impact on the corporate governance and performance of Canadian issuers. This, in turn, would have a significant adverse affect on issuers, investors, Ontario's capital markets and the economy in general. We refer you to the detailed research and analysis set out in the comprehensive white paper dated July 13, 2014 (the **White Paper**) with which we assisted the Managed Funds Association and the Alternative Investment Management Association. On the basis of that White Paper's extensive and considered research and analysis, including a comparative analysis to the beneficial ownership reporting regimes in the U.S. and other advanced capital markets, we unequivocally concluded that it is *not* appropriate to reduce Canada's early warning reporting threshold below 10%.

(a) Reducing the early warning reporting threshold was recently considered and rejected by the CSA

The CSA recently considered reducing the early warning reporting threshold from 10% to 5% in its notice and request for comment dated March 13, 2013 in respect of proposed amendments to then-Multilateral Instrument 62-104 – *Take-Over Bids and Issuer Bids*, National Policy 62-203 – *Take-Over Bids and Issuer Bids* and National Instrument 62-103 – *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*. Following the receipt and consideration of over 70 comment

letters, the CSA published CSA Notice 62-307 on October 10, 2014, in which it announced that the CSA would not proceed with amendments to reduce the early warning reporting threshold.

In concluding that it would not be appropriate to reduce the early warning reporting threshold from 10% to 5%, the CSA considered (i) the unique features of the Canadian market relative to the U.S. and other advanced capital markets, including the large number of smaller issuers and the limited liquidity of these smaller issuers and of our market, (ii) the potential detrimental or inadvertent impact of certain amendments, such as hindering an investor's ability to rapidly accumulate or reduce a large position and the signalling of investment strategies to the market, and (iii) the significant administrative and compliance burden associated with implementing additional reporting obligations. As discussed in more detail below, we agree with the CSA's assessment and submit that the concerns identified by the CSA in 2014 are as valid today as they were then.

(b) Reducing the early warning reporting threshold would chill the market for engaged investing to the detriment of issuers and investors

Disclosure of the acquisition of a stake by an engaged investor has a demonstrated effect of increasing share prices and thus the cost of further acquisitions of shares by the engaged investor.[26] As a result, the disclosure point under the early warning reporting system demarcates the end point for the opportunity to purchase an initial stake at a price that does not reflect the anticipated benefits that the engaged investor will bring to shareholder value. Narrowing the window of opportunity for engaged investors to build a stake in a company prior to disclosure would greatly reduce their opportunity to recover the necessary benefits from their discoveries to justify the resources, time and effort for such activity. This risk is particularly acute in Canada's smaller, more concentrated and less liquid markets. This would, in turn, chill the market for engaged investing and erode the numerous established benefits of value creation that result from shareholder engagement.

(c) Reducing the early warning reporting threshold would be inconsistent with the principle of proportionate regulation

Securities regulators have consistently reaffirmed that the costs of regulation should not outweigh the expected benefits. Regulation that is consistently crafted with reference to this principle of proportionality invariably reduces burden for market participants by minimizing the costs of compliance, which helps to ensure that Ontario remains an attractive destination for capital-raising activity. This philosophy of proportionality has never been more relevant than it is today in the wake of the various initiatives that the Ministry of Finance and the OSC are implementing in order to reduce regulatory burden.

A reduction of the early warning reporting threshold would significantly increase the costs of compliance for many investors. In order to justify such an increase in costs, it would have to be true that the corresponding benefit was even greater. The Report indicates that the benefit would be to enable

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[26] White Paper at p. 11-15.

issuers to more proactively engage with their shareholder base and allow shareholders to have a better understanding of sizable ownership interests. As a preliminary matter, we note that issuers and shareholders already have access to resources that can help them obtain information about large shareholders that have not crossed the early warning reporting threshold.[27] More importantly, in our view, additional visibility is not an adequate justification for the drastic regulatory change that the Taskforce is considering and inappropriately presumes that 5% is a sizable ownership stake. On the contrary, we are of the view that added transparency would be a net loss for Ontario's capital markets when one considers that a reduced early warning threshold would chill the market for engaged investing, as discussed above.

(d) The Canadian market requires a different approach to reporting than other jurisdictions

The Report notes that both the U.S. and the United Kingdom have lower reporting thresholds than Canada. Although that is technically true, a 5% early warning reporting threshold should not be adopted without due consideration of foreign reporting systems *in their entirety*. A proposal to adopt piecemeal aspects of other regimes would constitute a failure to fully evaluate each regime or to adequately consider the unique characteristics of the Canadian marketplace.

In the U.S., investors are subject to a 5% reporting threshold and must provide comprehensive disclosure regarding their purpose, plans and proposals in respect of acquisitions. However, the U.S. regime affords shareholders 10 days to file the applicable Schedule 13D report with the SEC and, unlike Canada, does not impose any moratorium on trading during that period. Therefore, the U.S. regime effectively provides shareholders with a 10-day window within which to build a stake sufficient to justify the costs of engagement and comply with the requirement for extensive disclosure. The *de facto* reporting threshold in the U.S. is therefore not 5%, but rather 5% *plus whatever additional interest can be acquired during the applicable 10-day window*.

In the U.K., investors are subject to a 3% reporting threshold for U.K. issuers and a 5% reporting threshold for non-U.K. issuers, along with an obligation on holders of securities of U.K. issuers to disclose to the issuer when their ownership interest reaches, exceeds or falls below any 1% interval between 3% and 100%.[28] The U.K. threshold is in respect of all of an issuer's voting shares rather than each class of voting or equity securities, as is the case in Canada. Disclosure must be made to issuers and, if the disclosure relates to shares traded on a regulated market, filed by the shareholder with the Financial Conduct Authority, within four trading days for non-U.K. issuers and within two trading days in all other cases, the first of which shall be the day after the date on which the shareholder (i) learns of the acquisition or disposal or the possibility of exercising voting rights, or on which, having regard to the circumstances, the shareholder should have learned of it, regardless of the date on which the acquisition, disposal or possibility of exercising the voting rights takes effect, or (ii) is informed of the event. A person is deemed to have knowledge of the acquisition, disposal or other event no later than two trading days after the transaction. As a result, the latest disclosure point may not occur until up to

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27 For example, issuers and shareholders can review shareholder registers, request NOBO lists and obtain extensive information via resources such as Bloomberg and S&P Capital IQ.

28 Non-U.K. issuers are subject to a 5% reporting threshold and must only disclose when they reach, exceed or fall below 5%, 10%, 15%, 20%, 25%, 30%, 50% or 75%.

four or six trading days from the time of the initial transaction depending on whether or not the issuer in question is a U.K. issuer. Similar to the U.S., and unlike Canada, there is no moratorium on further acquisitions. Therefore, the *de facto* reporting threshold in the U.K. is not 3% for U.K. issuers and 5% for non-U.K. issuers, but rather 3% and 5%, respectively, *plus whatever additional interest can be acquired prior to being required to disclose the transaction*.

It is also important to emphasize the differences between the U.S. and U.K. market, on one hand, and the Canadian market, on the other. For shareholders that want to invest in Canada, the prevalence of smaller issuers means that the gross dollars that investors may deploy before crossing the disclosure threshold under the early warning reporting system is significantly lower than it is in other jurisdictions, and would be halved if the threshold were reduced from 10% to 5%. Given that smaller issuers tend to be more reliant on raising equity capital and are shown to benefit to a greater extent from activism than larger issuers, the adverse impact of reducing the early warning reporting threshold on the competitiveness and efficiency of Canada's markets would be particularly pronounced.

(e) A shareholder's ability to requisition a meeting is not relevant to the early warning reporting threshold

The Report suggests that reducing the early warning reporting threshold from 10% to 5% is appropriate, in part, because it is possible for a shareholder holding 5% of an issuer's voting securities to requisition a meeting of shareholders under corporate law. However, the two regimes bear no relationship to one another. The requisition threshold serves as a right granted by corporate law to shareholders holding a meaningful stake to bring a matter before shareholders, whereas the primary purpose of the early warning reporting system is to alert investors and target issuers of impending take-over bids or other events that would influence control over the issuer or its leadership. The use of the early warning reporting system to warn issuers about the potential exercise by shareholders of their fundamental franchise rights was not part of its original policy objective. Furthermore, a group of shareholders pooling their shares solely to satisfy the requisition threshold would be subject to needless additional regulatory burden by having to comply with the early warning reporting regime, which could dissuade shareholders from exercising their rights under corporate law. Even if there were a relationship between a shareholder's ability to requisition a shareholders' meeting and the early warning reporting system, we do not believe that shareholder requisitions are a sufficiently frequent or significant occurrence to warrant such a significant change.

As noted above, we invite the Taskforce to review the White Paper for more detailed research and additional arguments and analysis that further illustrate why the early warning reporting threshold should not be reduced from 10% to 5%.

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

We **do not support** the proposal to adopt quarterly filing requirements for institutional investors of Canadian companies. Requiring institutional investors that own securities exceeding an aggregate specified dollar threshold to disclose their interests on a quarterly basis raises many of the same

concerns as reducing the early warning reporting threshold from 10% to 5%. Specifically, it would make share acquisitions by engaged investors more expensive and, in many circumstances, too costly to justify the resources, time and effort for such activity. In addition: (a) quarterly disclosure is not necessary to enable issuers to engage with their shareholders; (b) quarterly disclosure would largely duplicate the disclosure provided in early warning and alternative monthly reports; and (c) recent proposed amendments to the U.S. regime indicate that quarterly disclosure may not be appropriate.

(a) Issuers are capable of engaging with shareholders without quarterly disclosure by institutional investors

The Report states that the lack of transparency into institutional investors' ownership positions hinders shareholder engagement and the ability for issuers to respond to shareholder concerns. The basis for this assertion is unclear. From a practical perspective, it is our understanding that many issuers have a reasonably detailed understanding of the identities and equity interests of their significant shareholders, particularly institutional shareholders who are increasingly more proactive and vocal in their engagement. More importantly, to the extent that shareholders raise concerns with an issuer, it is unreasonable to suggest that the issuer would be unaware of that shareholder or somehow incapable of responding to its concerns. In this regard, good corporate governance would require an issuer to try to understand and respond to concerns raised by any and all of its shareholders, regardless of whether they are retail shareholders that own only a few shares or large pension funds or asset managers that own a significant block.

(b) Quarterly disclosure by institutional investors would largely duplicate the disclosure provided in early warning and alternative monthly reports

The disclosure contemplated by this proposal would overlap significantly with disclosure that institutional investors are already required to provide in order to comply with the early warning and alternatively monthly reporting regimes. This would be exacerbated if the Taskforce proceeded with its recommendation to reduce the early warning reporting threshold from 10% to 5% (to which we are strongly opposed), since it would only result in new disclosure in circumstances in which an investor (i) beneficially owns less than 5% of a class of an issuer's voting or equity securities, and (ii) holds securities of Canadian reporting issuers that exceed the aggregate specified dollar threshold. Given the nature of the Canadian capital markets, and depending on what the aggregate specified dollar threshold is, it is unlikely that this would apply to many investors. Such duplicative disclosure is precisely the type of regulatory burden that should be eliminated rather than adopted.

(c) Proposed amendments to the U.S. regime indicate that quarterly disclosure by institutional investors may not be appropriate

One of the justifications for the proposal to require institutional investors to disclose their equity interests is that a similar regime exists in the U.S. Specifically, under section 13(f) of the U.S. *Securities Exchange Act of 1934* (the **1934 Act**), an institutional investment manager that exercises investment discretion over US$100 million or more in section 13(f) securities (generally being equity securities that trade on an exchange, certain equity options and warrants, shares of closed-end investment companies and certain convertible debt securities) must report its holdings on Form

13F with the SEC. The utility of 13F filings is questionable due to the fact that such filings must be made within 45 days of the end of the applicable quarter, meaning that the information is stale by the time it is disseminated to the market. That said, expediting 13F filings would raise several other issues, including unduly increasing burden on investors.

Notably, on July 10, 2020, the SEC announced a proposal to amend Form 13F to increase the reporting threshold for institutional investment managers from US$100 million to US$3.5 billion.[29] The SEC stated that this reflects proportionally the same market value of U.S. equities that US$100 million represented in 1975 when the requirement was first introduced by Congress. The SEC's proposal should be viewed as an indication that the SEC itself is questioning the value of such filings for all but the largest investors. Accordingly, the Taskforce should be wary of recommending the adoption of a similar regime in Ontario. If a similar reporting requirement is implemented, the threshold should be sufficiently significant to include only the largest institutional investors in Canada.

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

Although we support mandatory advisory votes on executive compensation (**Say-on-Pay**), we **do not support** mandatory annual Say-on-Pay votes for all TSX-listed issuers and do not believe that Say-on-Pay should mandated by securities regulators.

Say-on-Pay votes are relatively common among Canadian reporting issuers. As noted in Davies Governance Insights 2019 (see chapter 1), in 2019, approximately 83% of TSX60 issuers and 52% of all TSX Composite Index and TSX SmallCap Index issuers held Say-on-Pay votes. However, the rate at which Canadian issuers are voluntarily adopting Say-on-Pay votes has plateaued. In 2016, 83% of TSX60 issuers and 44% of TSX Composite Index and TSX SmallCap Index issuers held Say-on-Pay votes, representing no increase among TSX60 issuers and only an 8% increase among TSX Composite Index and TSX SmallCap Index issuers over the last three years.

In many cases, Say-on-Pay votes can be beneficial for issuers, investors and Ontario's capital markets. Among other things, Say-on-Pay: (a) addresses the structural conflict of interest problem that directors face when crafting compensation policies by giving shareholders a voice in executive compensation; (b) may improve corporate governance, particularly by enhancing the dialogue between directors and shareholders; and (c) may improve the link between executive pay and company performance and increase overall firm value. Even if the efficacy of Say-on-Pay is not as significant as some suggest, investors may be less inclined to invest in Canadian issuers if there is a perception that Canada is lax with respect to corporate governance.

Notwithstanding the benefits associated with Say-on-Pay, whether it should be mandatory is primarily a corporate law matter as opposed to a securities regulatory matter. In this regard, we note that

[29] SEC, "SEC Proposes Amendments to Update Form 13F for Institutional Investment Managers; Amend Reporting Threshold to Reflect Today's Equities Markets" (July 10, 2020), online: https://www.sec.gov/news/press-release/2020-152.

amendments to the *Canada Business Corporations Act* (the **CBCA**) will require "prescribed corporations" to develop and disclose their approach to the remuneration of members of senior management and to hold a Say-on-Pay vote. In our view, the preferred means of addressing Say-on-Pay would be via similar amendments to the *Business Corporations Act* (Ontario) and the other provincial and territorial corporate statutes, on a consistent and harmonized basis. Any alternative would be a half-measure that would result in further confusion and fragmentation of the disclosure and governance requirements among reporting issuers in the Canadian capital markets.

In addition, as we discuss in our Davies Governance Insights 2017 (see chapter 7), even if Say-on-Pay votes provide benefits, it is not universally accepted that Say-on-Pay votes should be held annually. While the results of the U.S.'s second shareholder advisory vote on the frequency of Say-on-Pay voting held in 2017 and other studies suggest that a majority of institutional investors (as opposed to issuers) favour annual Say-on-Pay votes over biennial or triennial votes, there are drawbacks to mandating annual Say-on-Pay resolutions. Yearly Say-on-Pay votes may unduly increase focus on the short-term and lead to greater costs and complexity. With the continued evolution of governance best practices, many investors and issuers also believe other methods of engagement between issuers and their significant shareholders provide more meaningful input into issuers' compensation decisions. In addition, in our view, the frequency of a Say-on-Pay vote (like many governance and disclosure practices more generally) should be a contextualized decision made by an issuer's board and will depend on company-specific factors, such as the size of the company, its financial performance, the presence of recent problematic executive pay practices and the level of shareholder support for the Say-on-Pay votes at past meetings.

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

We **do not support** the proposal to empower the OSC to provide its views on the exclusion by an issuer of shareholder proposals in the issuer's proxy materials. In our view, this would be inappropriate given that, in Canada, shareholder proposals are entirely within the purview of corporate law. Respectfully, the OSC has no unique expertise or insight that would be relevant in determining whether a shareholder proposal could justifiably be excluded from an issuer's proxy materials. We are concerned that this proposal is effectively a request to delegate matters that are properly considered by Canadian courts to the OSC on the basis that it would be cheaper and faster. In addition, we question whether this is a sufficiently frequent or significant occurrence for Canadian issuers to warrant the costs of implementation. As we discuss in our Davies Governance Insights 2019 (see chapter 7), an aggregate of 62 proposals were put forward to 30 Canadian issuers on the TSX Composite and SmallCap indices in 2019, in line with the high levels witnessed in 2015. During the three-year intervening period, 37 (2018), 46 (2017) and 47 (2016) proposals were put forward to issuers on the TSX Composite and SmallCap indices. Although a CBCA issuer can reject a shareholder proposal on many of the same procedural or substantive grounds as U.S. issuers can, unlike the U.S. shareholder proposal regime, Canada's securities regulators are *not* charged with overseeing shareholder

proposals. As noted above, the issuer's board retains that responsibility and must make its decision within the confines of the corporate statute by which the issuer is governed.

Although the SEC is empowered to provide no-action letters with respect to the inclusion or exclusion of shareholder proposals in an issuer's proxy materials, the SEC's authority is derived from a specific rule (14a-8) in the 1934 Act that dates back to 1976. In Canada, matters pertaining to shareholder proposals are exclusively set out in the federal, provincial and territorial corporate statutes rather than securities legislation. It should also be noted that the SEC has changed its practice with respect to no-action letters; beginning with the 2019-2020 shareholder proposal season, in cases where a company seeks to exclude a proposal, SEC staff will inform the proponent and the issuer of its position, which may be that staff concurs, disagrees with or declines to state a view, and staff may also respond orally instead of in writing with respect to no-action letter requests. The number of no-action letters provided by the SEC in the last year dropped precipitously, as only 31 out of 239 (or 13%) requests resulted in a no-action letter.[30]

In our view, a Canadian reporting issuer, with the assistance of its internal and/or external legal counsel, should be capable of determining for itself whether it has a valid basis on which to exclude a shareholder proposal from its proxy materials. If it is unclear whether the issuer has such a basis, one would expect the issuer to err on the side of including the proposal in its materials in order to enfranchise shareholder participation to the fullest extent possible.

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

We **do not support** the proposal to mandate enhanced disclosure of material environmental, social and governance (**ESG**) information that is compliant with either the Sustainability Accounting Standards Board (**SASB**) framework or the Financial Stability Board's Task Force on Climate-related Financial Disclosures (**TCFD**) recommendations. We acknowledge that in order to make informed investment and voting decisions, investors, and particularly institutional investors, have expressed a desire for greater and more detailed disclosure of the material risks, opportunities, financial impacts and governance processes related to ESG matters. However, issuers are already shifting towards providing enhanced ESG disclosure, which does not necessitate the expansion of existing securities regulatory requirements. Specifically: (a) the CSA recently reaffirmed a principles-based approach to ESG disclosure, including climate-related disclosure, based on existing materiality standards, rather than a strict rules-based approach, which we believe is appropriate; and (b) market participants are capable of improving Canadian issuers' ESG practices and disclosure without additional regulation.

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[30] SEC, "Shareholder Proposal No-Action Responses Issued Under Exchange Act Rule 14a-8" (August 27, 2020), online: https://www.sec.gov/corpfin/shareholder-proposals-no-action. As at August 27, 2020, the last time that SEC staff responded with a no-action letter was April 9, 2020.

(a) <u>The CSA recently reaffirmed a principles-based approach to ESG disclosure rather than a rules-based approach</u>

Existing Canadian securities laws already require the disclosure of material information and impose liability on issuers (and others) for making untrue statements of material facts, omitting to state material facts necessary to make a statement not misleading in the light of the circumstances in which it was made and for failures to make timely disclosure of material changes. The same holds true for the wide range of ESG-related disclosure. For example, with respect to material climate change-related risks in an issuer's regulatory filings, the CSA has provided guidance in CSA Staff Notice 51-333 – *Environmental Reporting Guidance* (**SN 51-333**) and, more recently, in CSA Staff Notice 51-358 – *Reporting of Climate Change-related Risks* (**SN 51-358**) consistent with the overarching disclosure regime.

Canada's existing continuous disclosure regime requires issuers to disclose *all* material risks affecting their business and, where practicable, the financial impact of those risks, in their AIFs and MD&A. For these purposes, securities laws have long recognized that, in making materiality judgments, there is no simple bright-line standard or test and that the materiality of any particular event or information will vary among issuers based on a variety of factors.[31] In August 2019, the CSA published SN 51-358, which provides guidance for reporting issuers to develop more effective disclosure of material risks, opportunities, financial impacts and governance processes relating to climate change. Notably, SN 51-358 did not create any new legal requirements; rather, it reinforced and expanded upon guidance previously provided in SN 51-333 and maintained an approach consistent with the overarching securities law disclosure regime. This was also the case earlier this year when the CSA released its guidance concerning COVID-19-related disclosures, again recognizing that there is no 'one-size-fits-all' model for issuers to follow when assessing the disclosure implications of the pandemic.[32]

As with the regulation of PAFs, the CSA has been considering the appropriate approach to ESG-related matters for several years. As such, its analysis and conclusions should not be overlooked or ignored. In our view, the CSA's principles-based approach, which focuses on materiality, strikes an appropriate balance between requiring necessary disclosure while allowing for flexibility and acknowledging that a universal standard is not appropriate for every issuer. While climate change is one aspect of ESG, the host of factors and considerations, including financial reporting and disclosure frameworks, that will be most relevant to issuers will vary significantly depending on, among other things, the issuer's size, its industry, its operations, its stakeholders and the jurisdictions in which it carries on business. Accordingly, disclosure requirements that are too prescriptive would be unduly burdensome and would likely have unintended negative consequences that would far outweigh the benefits.

Moreover, a materiality-driven, principles-based approach to ESG-related disclosure is more adaptable to evolving market trends, expectations and standards and disruptive events, and minimizes the risk that bright-line tests or rules will, in time, become ill-suited to changing circumstances. This has been

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[31] See NI 51-102 and NP 51-201.

[32] See CSA Presentation, "COVID-19: Continuous Disclosure Obligations and Considerations for Issuers" (May 6, 2020), online: https://www.securities-administrators.ca/uploadedFiles/General/pdfs/COVID-19_Continuous_Disclosure_Obligations_and_Considerations_for_Issuers.pdf.

recognized in several other contexts, including with respect to AIFs, MD&A and other continuous disclosure form requirements which have fallen out of step with many issuers' business practices due to some of their narrowly-crafted disclosure requirements.

(b) Market participants are capable of improving Canadian issuers' ESG practices and disclosure without additional securities regulation

Market participants are well-equipped to ensure that issuers continue to improve upon their ESG practices and meet investors' (not always consistent) ESG-related disclosure expectations without the need for inflexible rules. We have witnessed this over the past decade in the explosion of ESG-related policies, practices and disclosures being made by issuers. On climate change, while securities laws do not prescribe a particular framework for disclosing those risks, many issuers are already doing so on a voluntary basis in accordance with one or more available disclosure standards, and we are seeing a convergence towards the use of the TCFD recommendations due to widespread support by government, international organizations and the recent alignment efforts by other available disclosure frameworks.

In addition, investors are driving significant change in this area, and are increasingly 'walking the talk' with respect to their commitment to ESG issues. In June 2019, a group of 88 investors with almost US$10 trillion in assets targeted over 700 global companies, including 34 Canadian reporting issuers, that the group deemed not sufficiently transparent about their environmental impact.[33] In January 2020, BlackRock, Inc. announced that it would remove from its discretionary active investment portfolios the public securities of companies that generate more than 25% of their revenues from thermal coal production and that it did not intend to make any future direct investments in those companies. BlackRock subsequently announced that it had identified 244 companies that were not making sufficient progress on adequately addressing climate risk,[34] and that it has taken voting action against 53 of those companies with the remainder being placed on a watch list. Shortly after BlackRock's January 2020 announcement, State Street Global Advisors reiterated its focus on financially material ESG issues and confirmed its intention to go beyond engagement and deploy its voting power in director elections to accelerate corporate action on ESG matters.

We have witnessed several other leading Canadian and foreign investors taking similar steps to shift the compositions of their portfolios and/or voting recommendations towards supporting issuers with ESG-friendly practices and disclosures, which is driving change. For example, in Canada, the Ontario Municipal Employees Retirement System (**OMERS**) has committed in its proxy voting guidelines to generally support proposals that request the reasonable disclosure of information or development of

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[33] CDP, "Group of 88 investors target over 700 companies for not reporting environmental information" (June 17, 2019), online: https://www.cdp.net/en/articles/media/group-of-88-investors-target-over-700-companies-for-not-reporting-environmental-information.

[34] BlackRock, Inc., "Our Approach to Sustainability" (July 2020), online: https://www.blackrock.com/corporate/literature/publication/our-commitment-to-sustainability-exec-summary-en.pdf.

policies related to ESG factors.[35] OMERS has stated that it will consider withholding votes from the chair of the relevant committee if, in its assessment, a company is not taking the appropriate steps to mitigate the risks stemming from climate change. Consistent approaches to ESG generally, and climate-related disclosure specifically, are also being taken by the CPP Investment Board,[36] the Alberta Investment Management Corporation[37] and the Ontario Teachers' Pension Plan.[38]

PAFs have been similarly active in exerting pressure on issuers. In its 2019 Proxy Paper Guidelines for Canada, Glass, Lewis & Co. (**Glass Lewis**) announced that, in the case of issuers that have not properly managed or mitigated environmental and social risks, it may recommend that shareholders vote against members of the boards who are responsible for oversight of these risks. Glass Lewis also announced that it will integrate sustainability disclosure guidance developed by the SASB into its proxy voting products. In addition, on May 5, 2020, the responsible investment arm of ISS announced a new Sustainable Development Goals (**SDG**) Impact Rating service.[39] The service will measure an issuer's impact with reference to the United Nations' SDG framework in order to identify how the issuer is managing the negative externalities in its operations across the entire value chain, as well as how the issuer is capitalizing on existing and emerging opportunities to contribute towards the achievement of the SDGs.

These developments highlight the fact that issuers that are unwilling to adapt and shift their policies and disclosures to better align with evolving market expectations are going to struggle to sustain long-term viability and attract capital. In our view, market forces are adequately addressing poor ESG practices and deficient ESG disclosure without the need for additional or more strict regulatory requirements beyond the materiality standards that already exist.

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[35] OMERS, "Proxy Voting Guidelines" (April 1, 2020), online: https://assets.ctfassets.net/iifcbkds7nke/76hZIwR6HOvjFxMWpODjgC/eab3221c3068048e8b6efd1902b1b91d/OMERS-Proxy-Voting-Guidelines-April-2020-FINAL.pdf.

[36] CPP Investment Board, "Proxy Voting Principles and Guidelines" (February 13, 2020), online: https://www.cppinvestments.com/the-fund/sustainable-investing/proxy-voting.

[37] Alberta Investment Management Corporation, "Proxy Voting Guidelines & Corporate Governance Principles" (January 2020), online: https://assets.ctfassets.net/lyt4cjmefjno/1Xc2BDu3jejmzIBKVjXh82/316ecc27d1ae98a25343d88d3e2e19d9/AIMCo_-_Proxy_Voting_Guidelines_-_January_2020.pdf.

[38] Ontario Teachers' Pension Plan, "2020 Corporate Governance Principles and Proxy Voting Guidelines", online: https://www.otpp.com/documents/10179/20940/-/bf03be90-a413-433f-bc4a-24a266ae17bb/2020%20Corporate%20Governance%20Principles%20and%20Proxy%20Voting%20Guidelines.pdf.

[39] ISS ESG, "ISS ESG Launches New SDG Impact Rating" (May 5, 2020), online: https://www.issgovernance.com/iss-esg-launches-new-sdg-impact-rating/.

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

We **strongly support** the Taskforce's proposal to require the use of universal proxies in circumstances in which either the issuer or a shareholder elects to use a universal proxy in connection with a contested shareholders' meeting. Shareholders that attend a contested shareholders' meeting in person are able to vote for any combination of management and shareholder director nominees. In contrast, this ability to "mix and match" is not similarly afforded to shareholders that vote by proxy, as they must vote on either management's proxy, which typically only includes management's nominees, or on the shareholder's proxy, which typically only includes the shareholder's nominees. Universal proxies that include all director nominees would enhance shareholder choice and simplify the mechanics of proxy voting.

We also **support** the related proposal to mandate interim voting disclosure as between the issuer and a shareholder that solicits proxies. In a contested meeting in Canada, neither the issuer nor the shareholder knows how many votes the other side has received until the proxy cut-off deadline has passed, at which time the issuer, but not the shareholder, has access to this information. Requiring disclosure of interim voting results as between the parties would encourage negotiated resolutions, as both parties would have a clearer understanding of their respective odds of success. This would also align Canada more closely with the U.S., where interim voting results are available to both sides.[40]

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

We **strongly support** the Taskforce's proposal to amend Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions* (**MI 61-101**) in order to codify the best practices set out in CSA Multilateral Staff Notice 61-302 – *Staff Review and Commentary on Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions* (**SN 61-302**) and the OSC's jurisprudence.

MI 61-101 addresses some of the most controversial transactions in our capital markets, including take-over bids made by insiders, transactions between reporting issuers and their related parties and transactions pursuant to which reporting issuers are taken private. Given its importance, it is problematic that many of the requirements applicable to conflict of interest transactions governed by MI 61-101 are not set out in the Instrument itself. For example, MI 61-101 only mandates that a special committee of independent directors be established in connection with an insider bid. However, other types of conflict of interest transactions, such as related party transactions and business combinations,

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[40] We understand that, in a contested meeting in the U.S. in which both sides have separate proxy cards, Broadridge will submit vote tallies three days before the proxy cut-off deadline unless either side requests the report beforehand. If and when one side makes such a request, the vote tally is then submitted to both sides and displays the votes on both cards.

frequently raise the same issues that a special committee would help to address in the context of an insider bid.

In addition, notwithstanding that special committees technically are not required for most transactions, as a practical matter, special committees are increasingly used as a procedural safeguard in a wide range of transactions and other high stakes and contentious situations. A material conflict of interest transaction that is negotiated or overseen by directors or management that are not fully independent will rarely be allowed to proceed or will face increased regulatory scrutiny or legal challenges. Although many market participants are sensitive to the issues raised by conflict of interest transactions and take steps to try to resolve them, it would be appropriate for the OSC's jurisprudence and staff's guidance to be codified to minimize the risk that issuers will fail to address such issues adequately.

In addition, we believe that MI 61-101 should be amended to codify and clarify the disclosure that is expected of issuers in connection with material conflict of interest transactions. Pursuant to MI 61-101, an MIC that an issuer must send to security holders when seeking minority shareholder approval for a conflict of interest transaction must include, among other things, a description of the background to the transaction and a discussion of the review and approval process adopted by the issuer's board of directors and special committee, if any.[41] SN 61-302 has helped to clarify these requirements by providing CSA staff's interpretation of what, in its view, constitutes satisfactory disclosure. In our view, it is important for these expectations to be codified if CSA staff continue to take the position that such information is, in fact, required in connection with a material conflict of interest transaction. This would also have a positive impact on board processes since any weaknesses would be more evident to CSA staff and other market participants.

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

We **strongly support** the Taskforce's proposal to provide the OSC with a broader range of remedies in relation to M&A transactions and proxy-related matters. In our view, ensuring that the OSC has all of the tools necessary to address transactions that are abusive of shareholders specifically and Ontario's capital markets generally is vital to fostering investor confidence.

Neither section 104 nor section 127(1) of the Act explicitly grants the OSC the authority to rescind a transaction or to prevent a party from exercising its voting rights. Accordingly, if an abusive transaction were structured such that closing occurred immediately after signing, it is unclear whether the OSC would be able to grant an adequate remedy. This was a significant issue in *Re Eco Oro Minerals Corp.*, in which the OSC concluded that the issuer in question had inappropriately issued shares to friendly parties in the midst of a contested director election. The OSC indirectly ordered that the transaction be rescinded in reliance on sections 8(3) and 21.7 of the Act, which empower the OSC to review the decisions of recognized exchanges such as the TSX. However, the OSC's decision was not without controversy and was in the process of being appealed to the Ontario Superior Court of Justice (Divisional Court) when the issuer and the dissident shareholders entered into a settlement agreement.

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[41] See sections 4.2(3)(b) and (e) and 5.3(3)(b) and (e) of MI 61-101.

The Report notes that the *Securities Act* (British Columbia) (the **BC Act**) was recently amended to provide the British Columbia Securities Commission (the **BCSC**) with the ability to, among other things, rescind a transaction, require any person to dispose of securities and prohibit a person from exercising a voting right attaching to a security. In light of the fact that the BCSC has been given these powers, a failure to grant the OSC similar powers would further fragment the Canadian regulatory landscape. This, in turn, could result in forum shopping by market participants that wish to avoid jurisdictions that have the ability to provide broad remedies for transactions that breach securities laws or that are otherwise prejudicial to the public interest.

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

We **do not support** the Taskforce's proposal to eliminate the NOBO and OBO statuses to allow issuers to access lists of all of the beneficial owners of their securities. The challenges in the proxy voting infrastructure have been debated for well over a decade. In 2010, we published a Davies' paper, The Quality of the Shareholder Vote in Canada, in which we reviewed the complex, opaque and fragmented system, including challenges that issuers have communicating with their non-registered investors. Since then, Canadian and U.S. securities regulators have considered, held consultations on and proposed reforms to the system, most recently in Canada resulting in the issuance of CSA Staff Notice 54-305 – *Meeting Vote Reconciliation Protocols* in 2017, aimed at enhancing the accuracy, reliability and transparency of the proxy voting infrastructure. Despite these efforts, many of the deficiencies in the system that we discussed in 2010 still exist today.

Among other identified problems, the distinction between registered and beneficial shareholders, and the further distinction between NOBOs and OBOs, contributes to the opacity and complexity of the system. And while the number of registered shareholders, NOBOs and OBOs of a particular issuer depends on a variety of factors, we acknowledge that the NOBO/OBO distinction contributes to a broken communication chain between issuers and their investors which, as an academic proposition, warrants a solution. However, in our view, simply eliminating the NOBO/OBO distinction and allowing issuers to access lists of all beneficial owners, regardless of where they reside, is problematic. Among other considerations, doing so: (a) would place Canada's capital markets and Canadian investors at a competitive disadvantage relative to their U.S. counterparts; (b) should only be considered within a broader reform of the proxy voting system and only after broad-based consultation and cost benefit analyses; and (c) needs to be accompanied by the implementation of other measures to preserve the privacy of those investors desiring it.

(a) Canada's capital markets and Canadian investors would be placed at a competitive disadvantage

Since the 1980s, in Canada and the U.S., most investors (retail and institutional) hold their shares indirectly through one or more intermediaries. Investors have a right under Canadian securities laws, as they do in the U.S., to elect not to allow their intermediaries to disclose their identities to issuers.

Those investors are known as "OBOs", whereas those who allow their identity to be disclosed are known as "NOBOs". While we acknowledge that the NOBO/OBO distinction creates additional complexity to an already complex and opaque proxy system, that distinction is nevertheless a hallmark of both the Canadian and U.S. systems.

When the NOBO/OBO distinction was first implemented in Canada in 1987 and in the U.S. in 1986, it was done following extensive consultation, debate and analysis. In our view, any steps taken to modernize Canada's capital markets should only be done bearing in mind an overarching desire to maintain consistency with, rather than further fragmentation between, the respective Canadian and U.S. proxy voting regimes and securities regulatory landscapes. Inconsistent regimes will only serve to hamper the competitiveness of Canada's capital markets and the footing of Canadian inventors relative to their U.S. counterparts.

Moreover, even if the distinction were to be eliminated in Canada, doing so would not give issuers access to the list of all beneficial shareholders, regardless of where they reside. As noted above, because the distinction exists in the U.S., issuers would continue to lack visibility into or access to information concerning their U.S. OBOs. Additionally, measures that protect the privacy of investors in other jurisdictions, and limitations on issuers' access to and use of certain foreign investor information, should be considered in determining whether or not the elimination of the distinction would have a meaningful benefit that outweighs the reduced privacy and competitiveness of Canadian investors. Lastly, absent other sweeping changes to Canadian corporate and securities laws, issuers would still lack visibility concerning some investors, such as those that have no economic interest in securities, or those that adopt other means to conceal their identity, such as acquiring interests in shares through nominees.

(b) <u>Any changes to the NOBO/OBO distinction should only be pursued within a broader reform of the proxy voting infrastructure after consultation and analyses</u>

The NOBO/OBO distinction is but one of many deficiencies in the proxy voting infrastructure, some of which, in our view, should take on equal or greater paramountcy as part of any proposed reforms. The proxy voting machinery involves, and is operated by. many different parties with at least as many different systems and databases. As a result, how communications flow between issuers and investors is not visible and cannot be resolved except in the context of broader reforms to the overall infrastructure. And, as the past ten years of debate has shown, the participants in the system have different commercial and legal interests in preserving versus changing the system, some of which will not be aligned with the interests of issuers or investors. Similar to past reviews of the system, any reforms should only be undertaken following broad-based consultations with market participants and cost-benefit analyses, consistent with what was done when the NOBO/OBO distinctions were first introduced almost 25 years ago.

Among other reforms needed, all participants in the system would need to be subject to some common oversight in order for communication and transparency to truly be achieved. This would, in turn, involve wide-spread changes across Canada's provincial and territorial corporate and securities laws in order to ensure harmonization of treatment across all Canadian investors. Any elimination of the NOBO/OBO distinction should only be undertaken within that broader context and, even then, should also address

some of the more acute problems in the system, such as empty voting, over-voting, end-to-end vote confirmation and vote reconciliation.

(c) Reform must be accompanied by additional measures to preserve privacy for those investors desiring it

The proposal does not address what measures might be appropriate or necessary to protect investors desiring a degree of privacy and control over their personal information, what information would be provided to issuers or how it may be used by issuers. Notwithstanding the layer of complexity the OBO concept adds to the proxy system, any proposed reform should, in our view, be accompanied by other changes that address investors' legitimate concerns in that regard.

There are valid reasons why an investor may prefer to remain anonymous or have some control over the information its intermediaries provide to issuers. For example, some investors may be concerned that they will receive too many unsolicited communications from issuers or their agents. They may also desire assurances as to the adequacy of issuers' cyber security measures to protect against data breaches or disclosures. Investors may also be legitimately concerned that their trading patterns will be revealed and capitalized on by other investors. Lastly, intermediaries will have a legitimate interest in protecting the privacy of their client lists, which interests may vary depending on the contexts (e.g., disclosure of investor information for a regular AGM in contrast with a contested meeting or M&A transaction). In addition, any proposal to eliminate the NOBO/OBO distinction should be accompanied by limitations on issuers' use of investor information – a delicate balance needs to be struck between giving issuers some investor information to facilitate proper communication, while ensuring that access to information is not unlimited in scope or use.

Lastly, any proposal aimed at providing issuers with greater access to information about their beneficial shareholders must also be accompanied by corresponding measures to ensure that investors who wish to communicate with an issuer's shareholders, such as in the context of a solicitation campaign or proxy contest, is facilitated. Maintaining a level playing field should be core to any such reforms.

2.6 Modernizing Enforcement and Enhancing Investor Protection

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

We generally **support** the automatic reciprocation of non-financial elements of orders and settlements from other Canadian securities regulators. We agree with the Taskforce's comments that these changes would enhance investor protection and the integrity of our capital markets. Similar automatic reciprocation provisions have been enacted in nearly all other Canadian provinces and territories.

We agree with the Taskforce's proposal that automatic reciprocation should not apply in Ontario unless the OSC has the power to make a similar order or settlement.

However, given the Taskforce's proposal that orders and settlements would be automatically reciprocated without respondents being granted an opportunity to be heard, we believe the proposed amendments should be accompanied by certain basic protections to ensure due process for respondents. In our view, these basic due process protections should include notice requirements similar to those contained in the *Reciprocal Enforcement of Judgments Act* (Ontario). In particular, the OSC should be required to publish notice of the automatic reciprocation within one month of the order or settlement being made or approved, which would trigger a further one month period for the respondent(s) to bring an application to clarify the applicability of the automatic reciprocation provisions in the circumstances. Moreover, the automatic reciprocation should apply to any amendment or revocation of the order or settlement. Any such amendment or revocation should trigger a fresh notice requirement and right to seek clarification of the continued applicability of the automatic reciprocation provisions. The combination of the notice requirement and the right to seek clarification will help to ensure that the OSC does not apply automatic reciprocation to orders or settlements that the OSC does not have the power to make.

We **do not support** the automatic reciprocation of foreign orders. We do not believe that foreign orders should be automatically reciprocated without first granting respondents an opportunity to be heard. As noted in the Report, the predicate for automatic reciprocation is the idea that a fair hearing has already been provided. While we believe it is reasonable to assume that this predicate applies to all Canadian securities regulators, it may not apply to all foreign securities regulators. Moreover, the securities laws – and the underlying objectives of such securities laws – can differ substantially from jurisdiction to jurisdiction. The procedural rights afforded to respondents can also differ substantially from jurisdiction to jurisdiction. For these reasons, we believe a streamlined application process should be adopted to allow respondents to challenge the recognition and enforcement of foreign orders and settlements on grounds similar to those applicable to the enforcement of foreign court judgments, namely: (a) that the foreign securities regulatory authority lacked jurisdiction; (b) fraud; (c) denial of natural justice; and/or (d) public policy. In order to help ensure that the application process is streamlined, we would support procedures that require the application to be dealt with in writing except in extraordinary circumstances.

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

Freeze orders are, by their nature, extraordinary and intrusive relief. Although we do not have a view on the proposal to extend the OSC's power to freeze and seize assets transferred below fair market value to family or third parties *where such assets are connected to an alleged breach of Ontario securities law* or to expand the OSC's powers to investigate such transfers, we **do not support** the proposed expansion of the OSC's preservation orders and investigative powers to include assets that are unconnected to an alleged breach of Ontario securities law, including assets transferred to family members or third parties that are unconnected to an alleged breach of Ontario securities law. We believe that this aspect of the proposal is too far-reaching and would unfairly tip the regulatory balance too far in favour of OSC staff in circumstances where a respondent has not (yet) been found to have breached any securities laws after a full merits adjudication of OSC staff's allegations.

We also **do not support** the proposal to limit access to drivers' licences and licence plates for monetary sanctions owing to the OSC. Such a proposal is extremely heavy-handed, potentially punitive and arguably not rationally connected to the objectives of securities regulation.

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

We **do not support** the proposal to create a new and specific prohibition on making misleading or untrue statements about public companies to make it easier for the OSC to deter and combat abusive short selling campaigns. Importantly, we do not believe it has been established on the basis of anything other than anecdotal evidence that "short and distort" campaigns and "pump and dump" schemes are particularly prevalent.

As the Report notes, activist short sellers provide clear and significant benefits to the capital markets; as such, any additional regulation needs to be carefully considered to avoid discouraging legitimate short selling campaigns. As the abundant academic literature in this field demonstrates, activist short selling is an important and legitimate activity that provides a natural counterbalance against excessive or inflated prices and an important check on issuers with questionable practices. Without activists who are incentivized by short selling profits to research and disseminate negative information about issuers to the market, the market is at risk of an information imbalance since issuers themselves are not incented to disseminate negative news. In addition to facilitating improved price accuracy by increasing the available information in the market, short selling has been an important factor in addressing market 'bubbles' and in uncovering financial misconduct. For example, in 2011, Muddy Waters, LLC (**Muddy Waters**) published a report accusing Sino-Forest Corporation (**Sino-Forest**) of being a Ponzi scheme riddled with fraud, theft and undisclosed related party transactions.[42] Following the publication of Muddy Waters' report, Sino-Forest shares fell 82%. Six years later, the OSC concluded that Sino-

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[42] Muddy Waters, "Muddy Waters Initiating Coverage on TRE.TO, OTC:SNOFF – Strong Sell" (June 2, 2011), online: https://www.muddywatersresearch.com/research/tre/initiating-coverage-treto/.

Forest "engaged in deceitful or dishonest conduct related to Sino-Forest's standing timber assets and revenue they knew constituted fraud, contrary to subsection 126.1(b) of the [Act], and contrary to the public interest."[43] Muddy Waters' work, rewarded only through short selling profits, was instrumental in shedding light on these deleterious business practices and sharing this vital information with the investing public.

In our view, securities regulators already have the requisite tools at their disposal to combat *abusive* short seller campaigns. Section 126.1 of the Act addresses fraud and market manipulation by prohibiting a person or company from directly or indirectly engaging or participating in "any act, practice or course of conduct relating to securities…that the person knows or reasonably ought to know, (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security…" Section 126.2 of the Act addresses misleading or untrue statements by prohibiting a person or company from making "a statement that the person or company knows or reasonably ought to know, (a) in a material respect and at the time and in light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; and (b) would reasonably be expected to have a significant effect on the market price or value of a security…" Section 127 of the Act also provides the OSC with broad powers to sanction conduct that is prejudicial to the public interest. These tools are in addition to those available under corporate and common law, such as the law of defamation. Accordingly, an activist's attempt to depress an issuer's stock price by knowingly spreading material *mis*information is already prohibited conduct capable of redress.

While the relatively few cases under securities laws in the short selling context have proved challenging for securities regulators to prosecute, it is not because of deficiencies in the rules themselves, but rather because of the inherent difficulty in distinguishing benign conduct from deleterious conduct. One of the challenges is proving that the statement is, in fact, untrue. We note that it took six years for the truth of Muddy Waters' assertions to be established. Another challenge is that the untrue statement must be reasonably expected to have a significant effect on the market price of the company's stock. The suggestion by some that the solution to this latter challenge is to eliminate the market impact component of the prohibition is insupportable,[44] not least because it would hold shareholders or short sellers to a higher standard when making statements about a public company than the standards to which the company itself is held. Moreover, the elimination of a market impact test can be expected to have a significant chilling effect on legitimate short selling activities given that these market participants

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43 *Re Sino-Forest Corporation*, 2017 ONSEC 27 at para. 1493.

44 We acknowledge that the BC Act was recently amended to, among other things, remove the market impact requirement. As noted above, we believe that this was an overreaction to a perceived and unsupported problem based on little more than anecdotal evidence that does not outweigh the chilling effect that this amendment will have on legitimate short selling campaigns. We would add that the mere fact that the BC Act was amended is not, in and of itself, a sufficient basis on which to make similar amendments to the Act. Piecemeal amendments, particularly at a critical time when regulators should be promoting harmonization, would increase forum shopping and result in greater fragmentation with respect to investors' rights and obligations throughout Canada. In our view, the amendments to the BC Act, which give broad powers to the BCSC to prosecute any alleged false or misleading statements without affording the targets of those complaints any due diligence defense, omitting any knowledge requirement and excluding a market impact test, represent unnecessary changes to our well-established securities law disclosure and liability regime, and offer a solution without a problem.

do not have access to company information beyond what the company itself publicly discloses, and are therefore forced to form opinions and draw conclusions from their own work and investigation.

The solution, for the time being, is for securities regulators to continue to bring well-prepared cases in the appropriate circumstances in the right forum using the statutory tools that are currently available to them.

Proposal #37: Increase the maximum for administrative monetary penalties to $5 million

We **do not support** the proposed substantial increase – or any increase – in the maximum administrative monetary penalties (**AMPs**), unless such increase is accompanied by clear statutory guidance for determining when to impose an AMP and in what amount, including explicit language confirming that the purpose of the AMPs is to encourage compliance with securities laws, rather than to punish respondents. We are concerned that without clear statutory guidance for the imposition of substantial AMPs, the proposed increases could, in some circumstances, unfairly and improperly punish individual and corporate respondents, as well as innocent shareholders already victimized by a corporation's violations of securities laws.

The statutory guidance should include a list of aggravating and mitigating factors to be considered in determining the amount of an AMP. Similar guidance is provided in numerous other statutes, including, for example, the *Competition Act*.[45] At a minimum, these factors should include: (a) the presence or absence of a direct benefit to the respondents; (b) the extent of injury to innocent parties; (c) for corporate respondents, whether participation in the securities law violations was widespread; (d) the intent of the respondents, with the most severe sanctions reserved for deliberate, intentionally fraudulent conduct; (e) the degree of difficulty in detecting the particular type of violation at issue, with the most severe sanctions reserved for securities law violations that are difficult to detect and thus call for an especially high level of deterrence; and (f) the respondents' cooperation and remedial actions. We note that a number of these factors are considered in the U.S. in determining the quantum of financial sanctions for securities law violations.

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

While we generally **support** strengthening OSC staff's powers to obtain production of relevant documents even when such documents reside on servers in the "cloud", the proposed new tools – including tools recently granted to BCSC staff – appear to go beyond what is necessary and appropriate to achieve the stated objectives.

We **do not support** the proposed requirement that firms and individuals that are not targets of investigations be required to "find and gather" and "prepare and produce" relevant documents, records or electronic data to an authorized OSC investigator in the form and within the time frame requested by

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[45] See section 79(3.2).

the investigator. These powers appear to us to be overly broad, disproportionate and subject to constitutional challenge. At a minimum, any new power requiring a firm or individual to prepare and produce a document or record must be subject to the condition that such document or record may not be used or received against the individual in any criminal proceedings.

Moreover, any new power to enter a business premises to review assets or other things should be subject to a requirement that an authorized person first apply to a court for an order authorizing the search if circumstances go beyond those specified in section 13(3) of the Act.

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

We **support** the Taskforce's proposal that greater statutory rights be afforded to persons or companies directly affected by an OSC investigation or examination, and also that a clear process be established for the adjudication of disagreements and disputes arising in the course of OSC staff's investigations and examinations. No such clear process currently exists.

We also **support** the proposal for greater transparency in the investigation process. In particular, we support the idea that documents should be shared with persons served with a summons to attend for an oral examination in order to facilitate the examination, streamline it and ensure due process for the witnesses and the persons subject to the investigation. In our experience, OSC staff's frequent practice of withholding documents from persons attending for an oral examination ('trial by ambush') has the frequent consequence of generating transcripts that are confused, require multiple qualifications and/or subsequent clarifications by witnesses and unnecessarily prolonging the examination.

In our experience, there is generally an informal opportunity to confer with OSC staff about the scope of a summons to produce documents. Formalizing the availability of such a process would be advisable as a means of reducing the frequency of persons affected by an investigation resorting to a formal adjudication of disputes arising in respect of the scope of a summons (see our comments on Proposal #42).

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

The recent addition to the Act of the confidentiality exception for disclosure to an insurer and an insurance broker was long overdue and important for reducing the regulatory burden on persons subject to an investigation.

We **strongly support** the expansion of confidentiality and disclosure exceptions to any person where the disclosure is necessary to comply with requests from OSC staff, as well as to a company's board of directors and senior management. For example, in our experience, there is often a lack of clarity when OSC staff serve a summons on an individual to produce documents regarding her or his activities through a company, where OSC staff's clear intent is to require production of company documents. It is

often not possible to fully comply with the scope of the summons without engaging other persons within the company or without such other persons becoming aware of the summons.

In addition to the specific confidentiality and disclosure exceptions raised by the Taskforce for consideration, we suggest that consideration also be given to an exception for disclosure to a person's spouse and/or close family members in appropriate circumstances. In our experience, it can often be extremely difficult for individuals who are the subject of an investigation to maintain confidentiality from a spouse or close family members, and it can be quite difficult for individuals to go through an investigation without spousal or familial support.

Proposal #42: Ensure proportionality for responses to OSC investigations

We **strongly support** statutory amendments providing that there is a "reasonable and proportionate" threshold to examinations and inspection of documents or other things in investigations and examinations.

The principle of proportionality, which is the principle that a fair and just process must be proportionate to the nature of the dispute and the interests involved, informs the conduct of civil proceedings in Ontario and across Canada. Indeed, the principle of proportionality is codified in Ontario's *Rules of Civil Procedure*. Its importance was affirmed by the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7. In that case, the Supreme Court called for a "culture shift" in order to create "an environment promoting timely and affordable access to the civil justice system". In our view, the same considerations apply to proceedings before the OSC.

Regrettably, in our experience, the principle of proportionality has not been applied consistently by the OSC during investigations. OSC staff frequently require market participants to produce vast amounts of electronic data pursuant to summonses issued under section 13 of the Act without full appreciation of the complexity, time and expense associated with compliance with a summons. The current approach to document requests in investigations is particularly concerning to us in light of a number of the other proposals set out in the Report, including in particular the proposal to create an offence for obstruction for non-compliance with a summons (Proposal #40). In contrast, other proposals in the Report, such as the proposal to broaden confidentiality exceptions (Proposal #41), would assist market participants in responding to summonses in a timely, reasonable and proportionate basis.

To further assist with the implementation of a "reasonable and proportionate" threshold, we support adopting a mandatory 'meet and confer' process (as per Proposal #39), whereby targets of investigation orders would meet (by phone or in person) with OSC staff within a specified date from the issuance of a summons to discuss and refine document requests, prioritize custodians and document sources, discuss search parameters and approaches, consider the appropriateness of rolling productions and agree upon a suitable format for production of documents in the circumstances.

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

Although we believe that the law is clear that the OSC cannot require the production of privileged documents or information during its investigations or examinations, we **support** any legislative amendments deemed appropriate or necessary to further clarify this point. Solicitor-client and other forms of privilege are fundamentally important to our legal system. As the Supreme Court of Canada recently confirmed, solicitor-client privilege cannot be set aside by inference. To give effect to solicitor-client privilege as a fundamental policy of the law, legislative language purporting to abrogate it, set it aside or infringe upon it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so.[46]

We **do not support** the Taskforce's proposal that the OSC's procedures be modified to require "immediate production" of a privilege log in cases where there is a challenge to the assertion of privilege or any related amendments that would dictate the contents of any such privilege log. While it may be fair and appropriate for the OSC to request privilege logs in certain cases, the amendments should recognize that the preparation of such logs can be burdensome, time consuming and, in some cases, require extensive dialogue between lawyers and their clients. Accordingly, we recommend that, in cases where it is necessary and appropriate for OSC staff to request a privilege log, respondents be provided with a reasonable period of time to prepare a proper privilege log and that any amendments to the OSC's procedures with respect to privilege logs incorporate the concept of proportionality (discussed in response to Proposal #42). In particular, the timing, format and content of a privilege log can and should be the subject of the 'meet and confer' process discussed above.

We do not believe that the amendments should stipulate a particular form or the content of any privilege log. Standard forms may not be appropriate in all cases, and may inadvertently require respondents to reveal privileged information. Instead, the amendments should provide respondents with sufficient flexibility to describe the nature of the documents not produced or disclosed, and to do so in a manner that, without revealing information itself privileged or protected, will enable the OSC to assess the claim of privilege.

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

In our experience, OSC staff issue an "enforcement notice" (or "Wells notice") to respondents in circumstances where they are considering initiating administrative proceedings, and typically provide 14 days for respondents to respond to such "enforcement notice" and/or reach out to have discussions with OSC staff. Although the typical "enforcement notice" provides that extensions to the 14-day period are unlikely to be granted, depending on the nature of engagement between OSC staff and a proposed respondent, the 14-day period is often extended by OSC staff.

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[46] See *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53.

Also in our experience, OSC staff may subsequently share a proposed "statement of allegations" with a proposed respondent and continue to engage with a proposed respondent prior to actually issuing staff's statement of allegations and formally commencing administrative proceedings.

It is not clear to us exactly what is being proposed in Proposal #44, as the title of the proposal refers to a "proposed statement of allegations", whereas the discussion under the proposal appears to be referring to an "enforcement notice". In responding to this proposal, we have assumed that the proposal is to extend the 14-day period for response to an "enforcement notice".

We **support** the proposal that a potential respondent be afforded additional time by default to consider and develop a response to potential OSC staff allegations. In our experience, two weeks from receipt of notice is generally insufficient, especially in complex matters, notwithstanding that a respondent will already have been aware of the preceding investigation.

We also make the additional suggestion that provision be made for a potential respondent, upon receipt of an "enforcement notice", being able to invoke an option to mediate the proposed allegations prior to OSC staff initiating proceedings. We believe that an early, confidential and non-binding mediation option would likely result in more timely resolutions of many administrative proceedings, as both OSC staff and proposed respondents could benefit from an experienced, neutral mediator's perspective on the matters.

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

We **strongly support** the adoption of additional measures to ensure the confidentiality of dialogue between OSC staff and parties under investigation. We share the concerns heard by the Taskforce that many parties under investigation by the OSC want to move towards a prompt resolution, but are practically impeded from doing so by the existence or prospect of civil liability, most particularly in the form of class actions. One measure that should be adopted is an explicit statutory recognition that a person may disclose information to OSC staff that is the subject of a privilege under the law of evidence, solicitor-client privilege or litigation privilege without a waiver of such privilege and with express requirements that OSC staff not disclose such information. Similar no waiver provisions currently exist in federal legislation, such as the *Bank Act* and the *Insurance Companies Act*. These no waiver provisions will likely assist settlement discussions, particularly in the context of multi-party cases.

In addition, we **strongly support** and encourage the expansion of no-contest settlements. While we recognize the controversy and potential for abuse surrounding no-contest settlements, in our view, the approach to date has been overly cautious and tightly circumscribed, resulting in a relatively limited number of no-contest settlements. The expansion of no-contest settlements will enable OSC staff to conserve their limited enforcement resources, and focus those resources on a greater number of cases

involving market participants that refuse to cooperate with, or voluntarily bring forward violations of securities laws to, OSC staff. This expansion should include a requirement that OSC staff consider whether a matter can be resolved fairly and appropriately through a no-contest settlement and whether mediation should be proposed to respondents in an attempt to reach a timely settlement.

3.1 Conclusion

We support several of the proposals on which the Taskforce is seeking comment. Amendments to securities legislation that will reduce regulatory burden and minimize regulatory friction points with other advanced capital markets without compromising investor protection are vital to ensuring that Ontario remains an attractive destination for issuers and investors alike. However, in our view, a number of the proposals included in the Report miss the mark and constitute a fundamental and misguided shift away from the sound principles that have formed the bedrock of securities regulation for decades. These latter, 'bad' proposals include, among others, disconcerting changes to the purpose and role of securities regulators, disregard for the importance of the prospectus process and an erroneous view that increased reporting by investors would be a positive development. We urge the Taskforce to be mindful of the various issues that we have identified when crafting its final recommendations to the Ministry of Finance, as it will not be possible to unwind detrimental changes to our securities regulatory framework once implemented.

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The following lawyers at our firm participated in the preparation of this comment letter and may be contacted directly should you have any questions regarding our submissions.

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APPENDIX A

LETTER TO CAPITAL MARKETS MODERNIZATION TASKFORCE DATED JUNE 16, 2020

[Please see attached.]

DAVIES

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June 16, 2020

BY EMAIL

The Capital Markets Modernization Taskforce of the Ministry of Finance (Ontario)
Email: CMM.Taskforce@ontario.ca

Dear Sirs/Mesdames:

Submissions in Response to Request from Capital Markets Modernization Taskforce

We are writing in response to your request for specific proposals to modernize Ontario's capital markets. We strongly support initiatives that further establish Ontario as a jurisdiction in which issuers choose to raise capital and investors choose to deploy capital. In addition to providing our feedback through our written submissions below, our partner Patricia Olasker participated in the Law Firms Roundtable held on June 16, 2020.

It is important to note that the biggest challenges clients face in raising capital in Ontario are ones that are beyond the scope of Ontario policy or law to address, including the following:

- The small size of Ontario's, and indeed Canada's, capital markets relative to the U.S. markets and all that flows from that, such as fewer specialty investors and a smaller market for innovative investment products.

- The French translation requirement, which introduces costs and delays into the process that can be the difference between including or excluding Canada in an offering.

- The fractured regulatory system across Canada that has never fully embraced harmonization, and one in which distinctly different regulatory climates, cultures and leanings have developed.

Because these challenges make Ontario's capital markets inherently less attractive than the U.S. markets, the reality is that in order to attract issuers and capital to Ontario, Ontario needs to minimize regulatory friction points. Our capital markets are simply more sensitive to friction points than other more robust markets.

To some extent, this can be ameliorated, although not eliminated, by three things: a system that, to the greatest extent possible, aligns with the SEC's rules to make cross border deals more seamless and the addition of Canada to an offering a low cost option; a determination to work towards achieving harmonization of regulation across Canada; and the inculcation of a culture within the regulatory body

of customer service, transaction facilitation and solution seeking. Our proposals in this regard are discussed below.

Due to the wide-ranging and general nature of the input that you are seeking, our proposals below are, by necessity, at a high level. We have also limited our proposals to initiatives that we think would be most meaningful for issuers (excluding investment funds), underwriters, investors and other capital markets participants with whom we regularly interact in our practice. Further details for many of our proposals are included in our comment letter dated March 1, 2019 (the "**2019 Comment Letter**")[1] to the Ontario Securities Commission (the "**OSC**") in response to the OSC's public consultation for burden reducing initiatives. Many of Davies' recommendations were adopted in the OSC's resulting report entitled "Reducing Regulatory Burden in Ontario's Capital Markets" (the "**OSC Report**"). However, we made many additional proposals for which no specific initiatives were proposed in the OSC Report; these additional proposals included changes to modernize and streamline securities regulation and reduce burden for issuers, thereby substantially improving the attractiveness of Ontario's capital markets. Some of these additional proposals are addressed below.

I. Consistently apply proportionate and transparent regulation

Regulation that is consistently crafted with reference to the principle of proportionality and applied in a transparent manner invariably reduces burden for market participants by minimizing the costs of compliance and enhancing certainty and predictability, which in turn helps to ensure that Ontario remains an attractive destination for issuers to raise capital. Having proportionate rules, that achieve important objectives and are clearly crafted, also allow regulators to identify, and concentrate their enforcement efforts on, the 'bad actors', thereby improving confidence in our capital markets through effective regulation. The following proposals will help to achieve these goals:

- **Apply proportionate approach to both current and new regulation.** Key among the OSC's decisions in the OSC Report was the OSC's pledge to apply proportionality in its rule-making. Regulation is proportionate when it is (a) balanced (ensuring the regulatory burden is commensurate with anticipated benefits), (b) tailored (avoiding a "one-size-fits-all" approach where appropriate, taking into account how it may affect entities of different sizes or business models), (c) flexible (recognizing that there can be multiple ways to achieve regulatory objectives, and incorporating stakeholder input to arrive at an optimal solution), and (d) responsive (through frequent updates that support innovation and dynamism in Ontario's capital markets, while still being mindful of investor protection, market efficiency, confidence in the market and financial stability). It is imperative that securities regulation is evaluated through the lens of proportionality. The following proposals pertain to the need for both retrospective and prospective analysis and evaluation by regulators:

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[1] Where applicable to the proposals below, we also refer to the further details in our comment letter dated July 28, 2017 (the "**2017 Comment Letter**") in response to the earlier burden reducing initiative of the Canadian Securities Administrators (the "**CSA**").

- ○ **Continue to review and refine current regulatory requirements to ensure that they are proportionate.** The OSC Report was a significant step in identifying and addressing existing disproportionate regulation, but it was merely a first step. There are countless current regulatory requirements for which the costs imposed are not commensurate with the anticipated benefits[2], that take a "one-size-fits-all" approach or are otherwise needlessly rigid or that do not support innovation and dynamism.

- ○ **Scrutinize future rule-making to avoid regression to disproportionate regulation.** All of the valuable work done to identify and fix old, burdensome rules is undercut when new rules are proposed that fail to take a proportionate approach. A prime example is Proposed National Instrument 52-112 *Non-GAAP and Other Financial Measures Disclosure*. This proposed Instrument adds to, rather than reduces, regulatory burden by codifying prior guidance on non-GAAP financial measures and adding new disclosure obligations that apply a "one-size-fits-all" approach, forcing all issuers to provide the mandated disclosure no matter how meaningless, unusual or impractical it may be.

- **Bolster confidence in the regulation of our capital markets through improved transparency and increased enforcement against bad actors.** Market participants cannot be expected follow rules that they do not understand, interpretations that have not been widely disclosed and requirements that are applied on an *ad hoc* and inconsistent basis. At a minimum, a lack of regulatory transparency requires issuers and other market participants to spend time and money attempting to solve complex regulatory problems that may not exist. In some cases, it can have much more significant consequences, including impeding the execution of financings and transactions, chilling positive innovation in the capital markets and possibly even resulting in litigation. Likewise, where clear rules are broken by bad actors without consequence, market participants lose confidence in our capital markets. Some steps that could be taken to bolster confidence in our capital markets include the following:

  - ○ **Publish Staff's interpretative guidance in one place (with push notifications).** We understand that certain branches within the OSC, including the Corporate Finance Branch, maintain internal databases in which Staff log all external email and phone inquiries received from issuers, their counsel and investors, as well as Staff's responses to such inquiries. We appreciate that such responses only represent the views of Staff and not the OSC itself, and are binding on neither Staff nor the OSC. Nevertheless, we believe that a searchable database containing high-level, no-names summaries of such interactions would be an invaluable and cost-effective resource for all capital market participants and would promote regulatory transparency and consistency. In addition, it

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[2] We have identified a number of examples of disproportionate regulation in our proposals below and in our 2019 Comment Letter; however, these examples are not an exhaustive. Further, there are a number of antiquated regulatory requirements that, in a modern world, serve no purpose.

would be beneficial if prepared remarks made at conferences or otherwise outside of formal Staff Notices were similarly accessible.[3]

- **Publish guidance clarifying the OSC's public interest power.** The OSC has broad public interest jurisdiction to intervene in transactions and sanction parties even in the absence of a breach of the *Securities Act* (Ontario). We acknowledge the necessity of this power as a means to prevent the exploitation of loopholes in securities legislation to the detriment of Ontario's capital market participants. However, the existence of this power, coupled with the relative opacity regarding how and when the OSC and/or OSC Staff apply it, can have a chilling effect on novel but legitimate corporate actions. Accordingly, it would be beneficial for the OSC (or OSC Staff) to publish a framework that sets out how it undertakes its public interest analysis and whether that framework is different depending on the context (*e.g.*, an enforcement proceeding as opposed to a corporate transaction).

- **Eliminate 'unwritten' rules and excessive discretion of quasi-regulatory bodies.** The need for clear and transparent rules extends to all regulation applicable to the capital markets; it is not limited only to securities regulation. Canadian stock exchanges and other quasi-regulatory bodies often apply 'unwritten' rules or interpretations that add conditions or limitations to transactions that are unexpected and, in many cases, conflict with their published governing rules or regulations. Some of this stems from these bodies' seemingly unlimited discretion. These bodies also have rules and regulations that are too broad for their purpose or that address matters outside of their mandate and more properly fall within the purview of securities or corporate legislation. Each of these practices negatively affects deal certainty and dissuades issuers from choosing to raise capital in Ontario.

- **Increase enforcement against bad actors to promote confidence in Ontario's capital markets.** Issuers will not choose to raise money, and investors will not invest their money, in Ontario's capital markets if they do not have sufficient confidence in its fairness and integrity. Proportionate and transparent rules are not sufficient for Ontario's capital markets to grow and prosper without effective regulatory enforcement. It is critical that there be consequences to bad actors who choose not to abide by those rules. A prime example is insider trading. Where not punished, illegal insider trading can quite publicly and quickly erode the confidence of market participants. Increasing enforcement activity against illegal trading activity would serve as both a general and specific deterrent.

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[3] 2019 Comment Letter at p. 10.

II. Streamline the processes for capital raising

A. Update and improve the prospectus regime to make it more efficient, predictable and aligned with modern capital markets.

Public offerings are the lifeblood of the capital markets. It is open to all investors to participate in a public offering, as prospectus-level disclosure and protections are provided. For this reason, and because of the added rigour of the underwriting process, public offerings are also preferred by many institutional investors that would otherwise qualify to invest via the exempt market. Unfortunately, the process for qualifying an offering of securities under today's prospectus regime is unnecessarily complicated, time-consuming and expensive, and the marketing and execution of that offering are subject to limitations and conditions that are out of step with modern capital markets practices. This over-regulation can unnecessarily delay the launch or clearance of a prospectus offering or inappropriately impede the marketing of an offering, resulting in a missed window of opportunity or a failed transaction, and add to the already significant cost and time required to prepare a prospectus. Potential improvements to the current Canadian prospectus regime include the following:

- **Cut through the red tape required to launch a public offering and clear the associated prospectus.** There are a number of unnecessary regulatory impediments that prevent issuers from quickly and conveniently accessing Ontario's public capital markets and inappropriately divert time and resources of the OSC that would be better spent on processes that support investor protection and other regulatory objectives. The following proposals identify ways to fix some of these issues:

    - **Target the right disclosure in the short form prospectus review process.** This review should focus on disclosure specific to the particular offering rather than the issuer's existing continuous disclosure record. Continuous disclosure review should occur only in the normal course or as part of a confidential review process requested by the issuer. There is no longer a strong policy rationale for triggering continuous disclosure reviews merely by virtue of a short form prospectus offering, particularly for seasoned issuers. Doing so raises needless execution risk for a public offering.[4]

    - **Implement an "automatic" shelf procedure similar to the procedure available under U.S. securities legislation.** This would allow specified issuers to qualify (without prior review by securities regulators or any other delay) unspecified amounts of different types of securities by way of an "automatic" shelf.[5]

    - **Issue receipts for preliminary short form prospectuses automatically on their filing.** This would allow underwriters to immediately commence soliciting offers for a marketed public offering. Manual review of filing documents prior to the issuance of a

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[4] 2019 Comment Letter at p.5; 2017 Comment Letter at p. 7; OSC Report at p. 41.

[5] 2019 Comment Letter at p. 4; 2017 Comment Letter at p. 8; OSC Report at p. 41.

preliminary receipt, and the potential for further delay due to an administrative or other technical fault in those filings, results in unnecessary regulatory uncertainty that can have significant economic consequences to a marketed offering and provides no meaningful protection to investors.[6]

- **Eliminate burdensome and unnecessary filings, deliveries and disclosure required in connection with short form prospectus offerings.** The stated policy rationale for short form prospectus offerings is to shorten the time period in which, and streamline the procedures by which, qualified issuers and selling securityholders can obtain access to the Canadian capital markets through a prospectus offering. Despite these objectives, short form-eligible issuers are still required to make unnecessary filings and disclose irrelevant information. The following proposals would help meet the objectives of the short form prospectus regime:

  - **Eliminate or alter the process for clearing personal information forms ("PIFs").**[7] Requiring PIF clearances in the context of prospectus offerings can delay execution of an offering for reasons outside of an issuer's control, resulting in unnecessary execution risk.[8] PIFs should only be required, if at all, in circumstances where the associated burden is justified by the benefit (*e.g.*, in an IPO or for emerging market issuers) and (post-IPO) should be cleared, in the ordinary course, with the applicable stock exchange, without further clearance by securities regulators.[9]

  - **Eliminate or modify unnecessary short form prospectus disclosure requirements.** Several of the disclosure items prescribed by Form 44-101F1 could be eliminated or modified without adversely affecting investor protection. Most significant from a burden perspective is the earnings coverage ratio disclosure mandated by Item 6 of Form 44-101F1, as we understand that a typical investor in debt securities does not rely on the prescribed calculations in connection with its investment decision.[10]

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[6] 2019 Comment Letter at p. 4; 2017 Comment Letter at p. 7.

[7] PIFs are just one example of a filing or delivery burden imposed under the Canadian prospectus regime. Like many of those burdens, the PIF requirement is unique to the Canadian prospectus regime; there is no equivalent PIF requirement in the U.S. prospectus regime.

[8] The issues associated with the filing and clearance of PIFs have been exacerbated by the COVID-19 pandemic, as we understand that searches performed by one or more of the third party service providers on which the OSC staff relies are delayed such that the necessary clearances may not be received within the standard review time frame, thereby delaying clearance of a prospectus.

[9] 2019 Comment Letter at p. 8; 2017 Comment Letter at p. 5; OSC Report at p. 41. In the alternative, issuers should be entitled to clear PIFs at any time and outside of the context of a short form prospectus filing and, instead of resubmitting every three years, simply reconfirm the information on an annual basis.

[10] 2019 Comment Letter at p. 14; 2017 Comment Letter at pp. 4-5; OSC Report at p. 41. The OSC Report stated that the OSC would consider this as part of its ongoing work.

- **Reform the rules governing marketing and pre-marketing so they do not inhibit a successful public offering.** The marketing and pre-marketing rules are overly-prescriptive and conflict with commercial reality. The following are just a few ways in which these rules could be reformed without compromising investor protection:[11]

  - **Adopt a robust "testing the waters" regime that permits issuers and their underwriters to approach institutional investors in all prospectus offerings, not just certain IPOs.** This regime should also address the current deficiency in the marketing rules that effectively prevents the use of written materials in "wall crossed" shelf offerings.[12]

  - **Modify the requirement that all information in a standard term sheet or marketing materials be in the applicable prospectus.** This is far too narrow and the exceptions provided are far too limited. This also conflicts with equivalent provisions under U.S. securities legislation.[13]

  - **Expand permitted content of standard term sheet to include additional market and other offering-specific information that is standard for a term sheet.** Because the "standard term sheet" concept was not defined with regard to market practice, and is overly prescriptive, for almost every Canadian securities offering, issuers are forced bear the burden[14] of having term sheets filed as "marketing materials" and translated on an expedited basis, despite their not containing the type of information that should be caught if one applied the principles that underpin the marketing rules.[15]

B. Make it more efficient for issuers to access capital on a prospectus-exempt basis.

The purpose of the exempt market is to allow issuers to raise capital quickly and efficiently in circumstances where a prospectus is not necessary for investor protection. To better achieve this purpose, administrative burden should be reduced by eliminating associated requirements, either

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[11] These rules would also benefit from a number of corrections and clarifications to avoid their application in circumstances or in ways never intended. For examples, see the 2019 Comment Letter at pp. 10-11; 2017 Comment Letter at pp. 11, 14; OSC Report at p. 41.

[12] 2019 Comment Letter at p. 12; 2017 Comment Letter at p. 13; OSC Report at p. 41. The OSC Report stated that the OSC would consider expanding the "testing the waters" exemption for a prospectus offering as part of its ongoing work.

[13] 2019 Comment Letter at pp. 12-13; 2017 Comment Letter at p. 12; OSC Report at p. 41. Under applicable U.S. rules, a "free writing prospectus" may contain information that is additional to the registration statement in respect of the securities offering; it simply must not conflict with the information in that registration statement or the issuer's continuous disclosure record.

[14] In addition to the administrative burden, this can pose a significant problem for soft-sounding in the context of a potential debt offering by a shelf issuer.

[15] 2019 Comment Letter at p. 15; 2017 Comment Letter at p. 13.

entirely or in circumstances where they serve no purpose due to the sophistication of the purchaser. Accordingly, we would propose the following:

- **Eliminate the requirement to file reports of exempt distribution or limit their content.** If not eliminated entirely, the required content for these reports should be significantly narrowed. It is unclear how the prescribed reporting of the type currently required is necessary to meet the investor protection, market integrity and stability and risk reduction policy objectives of Canadian securities legislation. In particular, requiring issuers and underwriters to gather information regarding the identity of specific purchasers is not necessary to achieve this objective.[16]

- **Permit sophisticated institutional investors to purchase securities on a basis exempt from prospectus requirements and other securities laws.** A more straightforward prospectus "super exemption" should be established for all purchases by large, sophisticated institutional investors (*i.e.*, banks, investment funds and money managers) that possess the knowledge and experience to assess potential investments and that have the ability and leverage to negotiate the additional protections that they need. We understand that Canada is an outlier among countries with developed capital markets as it does not have such an exemption (for example, Rule 144A for Qualified Institutional Buyers in the U.S.). Ideally, such an exemption should cover all securities laws so that, for example, a foreign issuer that is an investment fund for the purposes of Ontario securities laws is not required to comply with the domestic regime applicable to investment funds. A large, sophisticated Canadian institutional investor participating in an offering does not require the protections afforded by the investment fund regime.[17]

- **Eliminate the requirement to deliver offering memoranda to the OSC.** This is an unnecessary burden for offering memoranda that are delivered voluntarily to prospective purchasers (in contrast with offering memoranda delivered pursuant to the exemption conditioned on provision of such disclosure). In addition, it subjects a non-public issuer to the risk of potential public disclosure of confidential information in its offering memorandum under freedom of information legislation or other regulatory processes. That risk can have a significant chilling effect on non-public issuers' participation in Ontario's exempt market.[18]

- **Eliminate the requirement for disclosure of statutory rights of rescission and damages in offering memoranda.** This disclosure is unnecessary, as these rights are provided in the publicly available *Securities Act* (Ontario), and is inconsistent with the requirements of most jurisdictions in Canada. This disclosure must be prepared or reviewed, as applicable, by issuer's

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[16] 2019 Comment Letter at p. 9; OSC Report at p. 36.

[17] 2019 Comment Letter at p. 12; OSC Report at p. 38. The OSC Report stated that this will require further study, but it has not been included as a formal recommendation.

[18] 2019 Comment Letter at p. 14; OSC Report at p. 38.

counsel or local Ontario counsel engaged specifically for this purpose, increasing the cost associated with prospectus-exempt distributions.[19]

- **Modify Ontario's Limited Partnerships Act.** Certain elements of this Act make it less likely that limited partnerships will choose to access Ontario's capital markets. For example, it is inappropriate to deem a partnership to be carrying on business in Ontario simply because it has extended its financing to include Ontario (by way of a private placement).[20] More generally, consideration should be given to allowing for true limited liability of limited partners in an Ontario limited partnership so that they are more viable public company vehicles.

C. Align Canadian capital raising requirements to better align with U.S. requirements and practices where appropriate.

The U.S. capital markets are a critical source of capital for many Canadian issuers and for opportunities for investment by Canadian investors. However, there remain a number of Canadian requirements that unnecessarily impede these capital flows, and subject issuers to overlapping and sometimes conflicting requirements, by virtue of misalignment with U.S. requirements and practices. While a number of these misalignments are addressed in our comments above, consideration should be given to the many other ways that regulation in Canadian capital markets can evolve to keep up with the more modern regulatory approach taken by corresponding bodies in the U.S.[21]

III. Streamline reporting to improve the quality of disclosure and the investor experience by focusing on relevant information and providing it in a modern way

The Canadian regulatory approach to disclosure, both in terms of content and the manner in which such disclosure is provided to investors, is in need of modernization. Currently, the rules and forms are overly-prescriptive, which results in many issuers undertaking a "tick-the-box" exercise rather than presenting the information that they believe is most relevant to investors in the most user-friendly manner possible. Affording issuers more discretion would reduce the time and expense required to provide such disclosure while simultaneously enhancing the investor experience. The following are measures that would help to accomplish this goal:

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[19] 2019 Comment Letter at p. 14; OSC Report at p. 38. The OSC Report stated that this will require further study, but it has not been included as a formal recommendation.

[20] Foreign issuers that are organized as limited partnerships are likely to exclude Ontario as a potential offering jurisdiction for a private placement because if they were to offer their securities in Ontario they would need to register in Ontario as an extra-provincial limited partnership, which requires appointing an agent for service of process in Ontario and making certain ongoing corporate filings indefinitely into the future even though they have no other connection to the province. Investors in foreign securities are aware that the issuer's assets and directors and officers are located outside of Ontario and therefore obtaining and enforcing judgments against them may be difficult.

[21] Additional suggestions may be found in our 2019 Comment Letter at pp. 11-13; however, these are not an exhaustive list.

- **Provide issuers with the option to consolidate periodic reporting requirements into a single report.** Allowing issuers the option to consolidate their annual MD&A, AIF and financial statements into a single annual report and interim reporting (MD&A and financials) into a single report for each quarter would improve how investors experience this disclosure (by providing all the necessary disclosure for a period in one place) while reducing the reporting burden on the issuer of producing multiple reports with significant overlap in the required information. This would also allow for cross-listed issuers to provide continuous disclosure more comparable to the consolidated reporting provided by their U.S. peers.[22]

- **Eliminate duplicative disclosure prescribed by the forms governing Canadian continuous disclosure.** Several prescribed MD&A disclosure items are adequately addressed through the equivalent note disclosure in an issuer's financial statements. For example, disclosure of financial instruments, critical accounting estimates, changes in accounting policies and contractual obligations on Form 51-102F1 has significant overlap with the disclosure requirements in IFRS. There is also considerable overlap in the disclosure items prescribed for an AIF and MD&A, and duplication between the AIF and proxy circular disclosure requirements with respect to directors and governance matters. If not eliminated, issuers should be allowed to satisfy duplicative disclosure requirements by cross-referencing the applicable disclosure in its other filed reports.[23]

- **Eliminate unnecessary or unhelpful disclosure prescribed by the forms governing Canadian continuous disclosure.** For example, prescribed disclosures for an issuer's AIF that could be eliminated or modified without adversely affecting investor protection include price range and trading volume statistics and credit ratings. In general, AIFs may provide more meaningful disclosure to investors if the form required disclosure that was less prescriptive and more focused on disclosure that might be material to an investor (consistent with the approach taken for MD&A).[24]

- **Modernize the guidance in NP 51-201 to provide alternative, modern media to "generally disclose" material information.** Ontario (and other Canadian jurisdictions) are significantly out of step with the capital markets of other jurisdictions, which allow their public companies to take

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22 2019 Comment Letter at p. 16; 2017 Comment Letter at p. 15.

23 2019 Comment Letter at pp. 13-14, 2017 Comment Letter at p. 15; OSC Report at p. 39. The OSC Report includes a recommendation to this effect, however no details have been provided as to how the AIF and MD&A forms will be revised. The OSC's May 2020 status update stated that this initiative has been delayed and that the target completion date is now "Summer 2022" (previously "Fall 2020").

24 2019 Comment Letter at p. 14; 2017 Comment Letter at p. 15; OSC Report at p. 39. The OSC Report includes a recommendation to this effect, however no details have been provided as to how the AIF and MD&A forms will be revised. The OSC's May 2020 status update stated that this initiative has been delayed and that the target completion date is now "Summer 2022" (previously "Fall 2020").

advantage of modern means to disseminate material information[25]. When updating its guidance, the CSA should also confirm that a brief, broadly disseminated notice (regardless of the medium) that material information is publicly available (either on SEDAR or on the issuer's website) is sufficient to "generally disclose" that material information. This is consistent with the principles underpinning the "access equals delivery" model being considered by the CSA.[26]

- **Reduce and simplify insider reporting filing requirements.** The CSA should reduce the circumstances in which insider reporting is required, and simplify the prescribed content of insider reporting filings made, as the time and money spent on their preparation is not proportionate to their benefit.[27]

IV. Facilitate shareholder communication and enhance shareholder democracy

The ability of shareholders to communicate their views to issuers' boards of directors and management and to other shareholders can have a significant impact on corporate decision-making. This is particularly important in the context of contested or potentially contentious situations; however, many of the rules in this area are under-developed, asymmetrical in their application to issuers and shareholders and unclear. Potential improvements that would foster shareholder communication and fairness and enhance shareholder democracy include the following:

- **Amend legislation or publish guidance with respect to the meanings of "solicit" and "joint actor".** These concepts are fundamental to shareholder communication, however the scope of each remains unclear. Specifically, the breadth of the definition of "solicit" leads one to believe that there are very few communications that would not constitute a solicitation, and there are very limited exceptions and scant jurisprudence to guide managements' and investors' conduct.[28] This ambiguity can unduly stifle communication among shareholders, including shareholders that may be in favour of changes to an issuer's board of directors but are concerned that any communication with fellow shareholders could contravene the proxy solicitation rules. Similarly, a relative lack of clarity with respect to the concept of "joint actor" has resulted in Canadian institutional investors being reluctant to align themselves publicly with another shareholder (at least at the outset of a proxy contest) out of concern that they will lose their freedom to trade in the securities of the target issuer. Although ultimately questions of fact, a legislated safe harbour for communications among shareholders or, at least, guidance that aids market participants in assessing whether a communication constitutes a solicitation or

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[25] As an example, since 2013, U.S. reporting companies have been permitted to use social media to disseminate information to the marketplace if the issuer has alerted investors about which social media platform will be used.

[26] 2019 Comment Letter at p. 17; OSC Report at p. 42. The OSC Report stated that the OSC would consider whether updated guidance is necessary but that it did not anticipate completing this within the next 24 months in light of its other priorities.

[27] 2019 Comment Letter at pp. 8-9; OSC Report at p. 42.

[28] See, *e.g.*, *Smoothwater Capital Partners LP I v Equity Financial Holdings Inc*, 2014 ONSC 324, in which the Ontario Superior Court of Justice held that because the principal purpose of the issuer's communication was to explain and defend its historical position, it did not run afoul of the rules against soliciting without a circular.

whether parties are joint actors would increase predictability and reduce the likelihood of litigation and facilitate communication among shareholders.

- **Eliminate gamesmanship over shareholder lists.** In the context of a contested meeting, target issuers should be required to provide dissidents with copies of all relevant shareholder lists that dissidents are not currently entitled to obtain under National Instrument 54-101, such as U.S. NOBO lists and DTC participant lists. Equal access to this information is necessary in order to facilitate the dissemination of information to shareholders and a fair and even-handed voting process and to give effect to the wishes of an issuer's shareholders. Regrettably, target issuers often threaten to withhold this information given the lack of a legal obligation to provide it. Although these lists are almost always provided to dissidents eventually, this is often preceded by a protracted back-and-forth between the parties' counsel (and occasionally an application to a court or a complaint to a securities regulator), which needlessly increases the costs borne by both parties.

- **Require issuers and soliciting shareholders to share interim voting results with one other.** In a contested meeting in Canada, neither the issuer nor the shareholder know how many votes the other side has received until the proxy cut-off deadline has passed when the issuer, but not the shareholder, has access to this information.[29] Requiring disclosure of interim voting results as between the parties would encourage negotiated resolutions, as both parties would have a clearer understanding of their respective odds of success. This would also align Canada more closely with the U.S., where interim voting results are available to both sides.[30]

- **Consider mandating or encouraging the use of universal proxies.** Shareholders that attend a contested shareholders' meeting in person are able to vote for any combination of management and shareholder director nominees. In contrast, this ability to "mix and match" is not similarly afforded to shareholders that vote by proxy, as they must vote on either management's proxy, which typically only includes management's nominees, or on the shareholder's proxy, which typically only includes the shareholder's nominees, unless management or the shareholder voluntarily elects to use a universal proxy. Universal proxies that include all director nominees could facilitate shareholder choice and simplify the mechanics of proxy voting. Despite their obvious benefits to shareholder democracy, universal proxies have been used only rarely in Canada, presumably because issuers and shareholders are uncertain as to whether their interests (as distinct from the interests of shareholders generally) are helped or hurt by them. Absent legislative changes or regulatory guidance, this is unlikely to change.

- **Expand the broadcast exemption to issuers.** A person or company other than an issuer's management (or a person acting on behalf of management) may solicit proxies without sending

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29 The shareholder must disclose its tallies to the issuer prior to the proxy cut-off deadline. The issuer has no obligation to reciprocate.

30 We understand that, in a contested meeting in the U.S. in which both sides have separate proxy cards, Broadridge will submit vote tallies three days before the proxy cut-off deadline unless either side requests the report beforehand. If and when one side makes such a request, the vote tally is then submitted to both sides and displays the votes on both cards.

an information circular if, among other things, the solicitation is made to the public by broadcast, speech or publication and certain information is filed on SEDAR. The inability of management to rely on this exemption makes it unduly challenging for an issuer to engage with its shareholder base in a timely manner without a risk of breaching the solicitation rules. This problem is compounded by the fact that corporate law prescribes that (a) a management information circular cannot be provided more than a specified number of days in advance of a shareholders' meeting, and (b) an issuer confronted with an (often unexpected) solicitation campaign by an engaged investor is constrained in the manner of its response until a management information circular has been filed and delivered to shareholders, meaning that, in practice, the window for management solicitation may be extremely small.

V. Conclusion

We applaud the Ministry of Finance and the OSC for their dedication and commitment to modernize Ontario's capital markets and make Ontario one of the top capital markets for investors, intermediaries and issuers globally. We firmly believe that many of the initiatives that have been or are proposed to be implemented will help to achieve that goal. For example, the recent amendments to the *Securities Act* (Ontario) that authorized the OSC to issue exemptive relief in respect of an entire class of persons or securities has allowed the OSC to be nimble and efficient in addressing the myriad of issues that have arisen as a result of the COVID-19 pandemic. We also strongly support the CSA's initiative to adopt an "access equals delivery" model to satisfy prospectus and other documentary delivery obligations under Canadian securities laws.[31] Notwithstanding the significant progress that has been made thus far, the above-noted proposals will further establish Ontario as a key jurisdiction in which issuers will want to raise capital.

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The following lawyers at our firm participated in the preparation of this comment letter and may be contacted directly should you have any questions regarding our submissions.

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[31] Please refer to our comment letter dated March 5, 2020 in response to CSA Consultation Paper 51-405 *Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers*, which sets out our views and analysis regarding the potential breadth of such a model and the benefits that would accrue to issuers and investors alike. In addition to these compelling arguments in favour of an access model to satisfy delivery obligations, the COVID-19 pandemic has made it patently clear that it is not advisable to require paper delivery of any document in any modern regulatory regime.