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Davies Highlights Concerns with Proposals to Modernize Ontario's Capital Markets

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Davies has submitted a comprehensive comment letter to the Capital Markets Modernization Taskforce (Taskforce) in response to the [consultation report](#) published by the Taskforce on July 9, 2020 (Report). The Taskforce was formed by the Ontario government in February 2020 with a mandate to review and modernize Ontario's capital markets. The Report, which followed consultations with market participants (including Davies), set out several proposals that would, if implemented, represent fundamental changes to Ontario's securities laws. Although we support some of the proposals in the Report, many others would not be beneficial for Ontario – and some would be disastrous. These "bad" proposals would ultimately have an adverse impact on issuers, investors and other market participants, eroding confidence in Ontario's capital markets and rendering them less attractive and competitive than other advanced capital markets.

We strongly support initiatives to modernize Ontario's capital markets and reduce regulatory burden. However, any significant changes to securities regulation should be considered only after thorough cost-benefit analyses and, if pursued, should be implemented on a national rather than a provincial scale to promote harmonization and minimize the growing overlap and fragmentation among corporate and securities laws and stock exchange requirements. Regulators should also 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 alignment is appropriate.

The Taskforce intends to deliver its final report to the Minister of Finance by the end of 2020.

[Download the comment letter.](#)

Some of the more significant (and problematic) proposals outlined in the Report include the following:

- Expanding the mandate of the Ontario Securities Commission (OSC) to include fostering capital formation and competition.
- Removing any "hold" period on securities privately placed with accredited investors.
- Introducing an "alternative offering" model that would allow reporting issuers to sell freely tradeable securities to the public without a prospectus.
- Allowing exempt market dealers to participate as sponsors of reverse takeover transactions.
- Decreasing the ownership threshold for early warning reporting disclosure from 10% to 5%.
- Adopting quarterly filing requirements for institutional investors of Canadian companies.
- Mandating enhanced disclosure of material environmental, social and governance information, including forward-looking information.
- Eliminating the "objecting beneficial owner" and "non-objecting beneficial owner" shareholder statuses to enable issuers to access the list of all beneficial security holders.
- Creating a prohibition to deter and prosecute misleading or untrue statements about public companies, divorced from the traditional market impact test.

- Enhancing the availability of pre-enforcement hearing seizure powers and extending them to assets unconnected with an alleged breach of securities laws.
- Strengthening investigative tools by empowering OSC staff to obtain production orders and enhancing compulsion powers.

Our “report card” below identifies each proposal on which we have provided comments and whether we believe that the proposal would be good or bad for Ontario’s capital markets. For complete details, including our arguments and analysis, please refer to our [comment letter](#).

Taskforce Proposals	Good	Bad
Proposal #1: Expand the mandate of the OSC to include fostering capital formation and competition in the markets		X
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		X
Proposal #6: Streamlining the timing of disclosure (e.g., semi-annual reporting)	✓	
Proposal #7: Introduce an alternative offering model for reporting issuers		X
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		X
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		X
Proposal #20: Introduce a regulatory framework for proxy advisory firms		X
Proposal #21: Decrease the ownership threshold for early warning reporting disclosure from 10 to 5 per cent		X
Proposal #22: Adopt quarterly filing requirements for institutional investors of Canadian companies		X
Proposal #23: Require TSX-listed issuers to have an annual advisory shareholders' vote on the board's approach to executive compensation		X
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		X
Proposal #25: Require enhanced disclosure of material environmental, social and governance information, including forward-looking information, for TSX issuers		X
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		X
Proposal #34: Consider automatically reciprocating orders and settlements from other Canadian regulators and streamlining reciprocation orders in response to other orders		X
Proposal #35: Improve the OSC's collection of monetary sanctions		X
Proposal #36: Create a prohibition to effectively deter and prosecute misleading or untrue statements about public companies and attempts to make such statements		X
Proposal #37: Increase the maximum for administrative monetary penalties to \$5 million		X

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

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This information and comments herein are for the general information of the reader and are not intended as advice or opinions to be relied upon in relation to any particular circumstances. For particular applications of the law to specific situations the reader should seek professional advice.