



Capital Markets Modernization Taskforce

FINAL REPORT

January 2021

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This document contains the policy proposals of the independent Capital Markets Modernization Taskforce (Taskforce). The views, opinions and recommendations expressed in this document are solely those of the Taskforce and are not made on behalf of the Government of Ontario. They do not necessarily reflect the official policy, position or views of the Government of Ontario. The document is not reflective of the views or positions of the Expert Advisory Group or endorsed by its members.

1.0 Overview

1.1 Message from the Chair

Job creation and economic prosperity. Fundamentally, these are the most important outputs of a successful capital markets regime. Ontario first enacted its capital markets laws in 1928. For decades, Ontario has been at the forefront of investor protection and market efficacy. We cannot fall behind. Late last year, former Minister Rod Phillips formed the Capital Markets Modernization Taskforce to review the current status of Ontario’s capital markets. By February 2020, Rupert Duchesne, Wes Hall, Melissa Kennedy, Cindy Tripp, and I were appointed to conduct this review.

Since the financial crisis in 2008, the global financial system has undergone significant changes. The ongoing COVID-19 pandemic has highlighted the need to be adaptive and forward-looking in developing a modernized capital markets. The Taskforce aimed to address the issues of tomorrow’s capital markets with bold and innovative recommendations that will make Ontario one of the most attractive capital market destinations globally.

The Taskforce worked diligently for ten months, through the COVID-19 pandemic. We met over 110 different stakeholders in our preliminary consultations, meeting with some repeatedly, and received over 130 stakeholder comment letters in response to our consultation report released in July 2020.¹ The consultation meetings and formal feedback told us that the time for change is now.

One of our main objectives is to amplify growth and competitiveness in Ontario’s capital markets. The decline in new issuers and initial public offerings in Ontario is alarming. The real consequences of this trend are fewer head offices, fewer entrepreneurs, and fewer growth investment opportunities, all of which could drive Ontario to become a “branch plant” economy. To address this, the Taskforce proposes recommendations to incubate junior issuers in this province by reducing the regulatory burden, providing new opportunities for capital-raising through the expansion of prospectus exemptions, and streamlining disclosure requirements, among others.

“The recommendations we have made are generational in their impact on the Ontario capital markets.”

Walied Soliman

Recommending proposals designed to spur the growth and establishment of independent dealers will increase the number of intermediaries who focus on connecting capital with smaller companies. Smaller companies, in particular, rely heavily on the independent dealer community to raise capital.

To give more choice to Ontario investors, we put forward recommendations to ensure that wealth management distribution channels provide greater access to competitive and independent wealth management products. Competition among product manufacturers leads to better and more innovative products, resulting in greater choice for investors.

¹ Capital Markets Modernization Taskforce. (2020, July). Capital Markets Modernization Taskforce consultation report. <https://www.ontario.ca/document/capital-markets-modernization-taskforce-consultation-report-july-2020>

Although developing recommendations to foster growth and innovation is important, all of our recommendations were made through the lens of investor protection. Instilling confidence in our capital markets is critical and investors need to feel safe. One way that confidence is instilled in our capital markets is through a transparent and effective corporate governance framework. Changes are being recommended to modernize governance standards and the proxy voting framework for Ontario's public companies to make it easier for companies to address stakeholder concerns, increase transparency, and encourage shareholder participation.

Our recommendations also support enhanced enforcement powers to protect investors and ensure a fair playing field for all market participants, while providing enhanced certainty and clarity on the enforcement process. We have also recommended new ways for funds to be returned to harmed investors.

In all, we have made over 70 consequential recommendations. The Taskforce was incredibly honoured to have had the confidence of, and encouragement from former Minister Rod Phillips in this endeavor. I would also like to thank the OSC for their support throughout this process. Ontario is privileged to have the hardworking individuals at the OSC working for us. They are talented, global capital markets leaders and we hope these recommendations will give them enhanced tools to help drive our capital markets objectives.

On behalf of the Taskforce, I would like to thank the stakeholders who have provided input during the preliminary consultations and submitted detailed, written comment letters. We are encouraged by the enthusiasm displayed by all stakeholders to work towards enhancing Ontario's capital markets.

This report is a result of a dedicated team effort and I extend my greatest gratitude to my fellow Taskforce members, Rupert Duchesne, Wes Hall, Melissa Kennedy and Cindy Tripp for their tremendous dedication and commitment to public service throughout this process. I want to thank Eric de Roos, Deputy Minister Greg Orencsak, Assistant Deputy Minister David Wai, Assistant Deputy Minister Sunita Chander, Shameez Rabdi, Jeet Chatterjee, Luc Vaillancourt and Diane Yee at the Ministry of Finance. I would also like to thank my partners Heidi Reinhart and Rowan Weaver, and my colleagues Abigail Court, Daniel Weiss and Scott Thorner from Norton Rose Fulbright, for their pro bono assistance to the Taskforce. Lastly, I would also like to thank members of the Expert Advisory Group for their advice and feedback throughout this process. The Government of Ontario is committed to modernizing our capital markets regulatory framework. The recommendations we have made are generational in their impact on the Ontario capital markets. Together, these changes will make our province more prosperous, entrepreneurial, competitive, and help position us as a global leader.

Respectfully submitted in December 2020, with thanks for this opportunity.

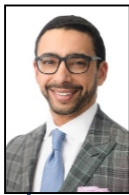


Walied Soliman
Taskforce Chair

1.2 Context

The Ontario capital markets regulatory framework was last reviewed in 2003.² Since this last review, the global financial system has undergone systemic changes, particularly in response to the 2008 global financial crisis that resulted in sharp declines in both economic output and capital markets activity. The capital markets regulatory framework, both domestic and international, has evolved and must continue to adapt to ever-changing markets.

As part of the Government of Ontario's commitment to modernize Ontario's capital markets, former Minister Rod Phillips established the Capital Markets Modernization Taskforce (Taskforce) in February 2020 and appointed five members to review and make recommendations to modernize Ontario's capital markets regulation. The Taskforce consists of the following members:³



Walied Soliman,
Taskforce Chair, Canadian Chair,
Norton Rose Fulbright



Rupert Duchesne,
CEO of Mattamy Ventures



Wesley J. Hall,
Founder and Executive Chair,
Kingsdale Advisors



Melissa Kennedy,
Executive Vice President, Chief Legal
Officer and Public Affairs, Sun Life



Cindy Tripp,
Founding Partner, former Managing
Director, Co-Head Institutional
Trading of GMP Securities L.P.

Since then, the ongoing COVID-19 pandemic has resulted in an economic downturn. The effects of the pandemic caused growth in Canada's real GDP to decline by 11.5 per cent in the second quarter of 2020 — the steepest decline since quarterly GDP data was first recorded in 1961.⁴ In the same quarter, Ontario also experienced the largest quarterly decline on record, with real GDP declining by 12.3 per cent. Ontario's nominal GDP declined by 13.3 per cent, net operating surplus of corporations contracted by 25.1 per cent, and the total business investment spending decreased by 16.4 per cent, all within the same quarter.⁵

² Five Year Review Committee. (2003, March 21). Reviewing the Securities Act (Ontario). https://www.osc.gov.on.ca/documents/en/Securities/fyr_20030529_5yr-final-report.pdf

³ The Appendix contains the biographies of all Taskforce members.

⁴ Statistics Canada. (2020, August 28). Gross domestic product, income and expenditure, second quarter 2020. <https://www150.statcan.gc.ca/n1/daily-quotidien/200828/dq200828a-eng.htm>

⁵ Ontario Economics Accounts. (2020). Second Quarter of 2020. Ontario Ministry of Finance. <https://fin.gov.on.ca/en/economy/ecaccts/#expenditure>

By the end of June 2020, the S&P/TSX Composite Index had rebounded about 44 per cent since its March 2020 low, but it was still 9.6 per cent below its February 2020 peak.⁶ These declines reflect the significant impact the COVID-19 pandemic has had on Ontario's economy.

Given this continued uncertainty, the COVID-19 pandemic has highlighted the need for a modernized capital markets to assist businesses in raising capital, particularly to deal with the short-term economic impacts of the pandemic. In addition, Ontario's capital markets regulatory framework must be modernized to incubate innovative companies, protect investors, attract investments and foster digitization in our capital markets.

Beyond the immediate feedback received from stakeholders, the Taskforce also considered market and industry trends. The trends affecting Ontario's capital markets are often complex and not mutually exclusive.

Many of these trends have been evolving and are constantly changing with today's environment. In this final report, the Taskforce has provided wide-ranging recommendations to address the multitude of issues brought to their attention.

The importance of public markets

Strong public markets, both primary and secondary, are an important component of capital formation. The primary market is where securities are first issued and sold to investors. It allows an entrepreneur with a dream to raise capital and hire more people, develop new technology, explore for natural resources or build a factory. The primary market is central to the success of Ontario's economy. It is where we incubate new jobs and companies and where Ontarians can participate in a growth story at the ground level. This is where our capital markets will incubate made-in-Canada success stories and support the creation of the next Shopify or Barrick Gold.

"In many countries, over the last decade, we have witnessed widespread modernization of securities regulation, including those jurisdictions with whom we fiercely compete for risk capital. Meanwhile, Ontario's securities legislation has not been modernized since 2003. A modernization review was both long overdue and critically urgent to re-establish the domestic and international competitiveness of Ontario's capital market."

NEO Exchange

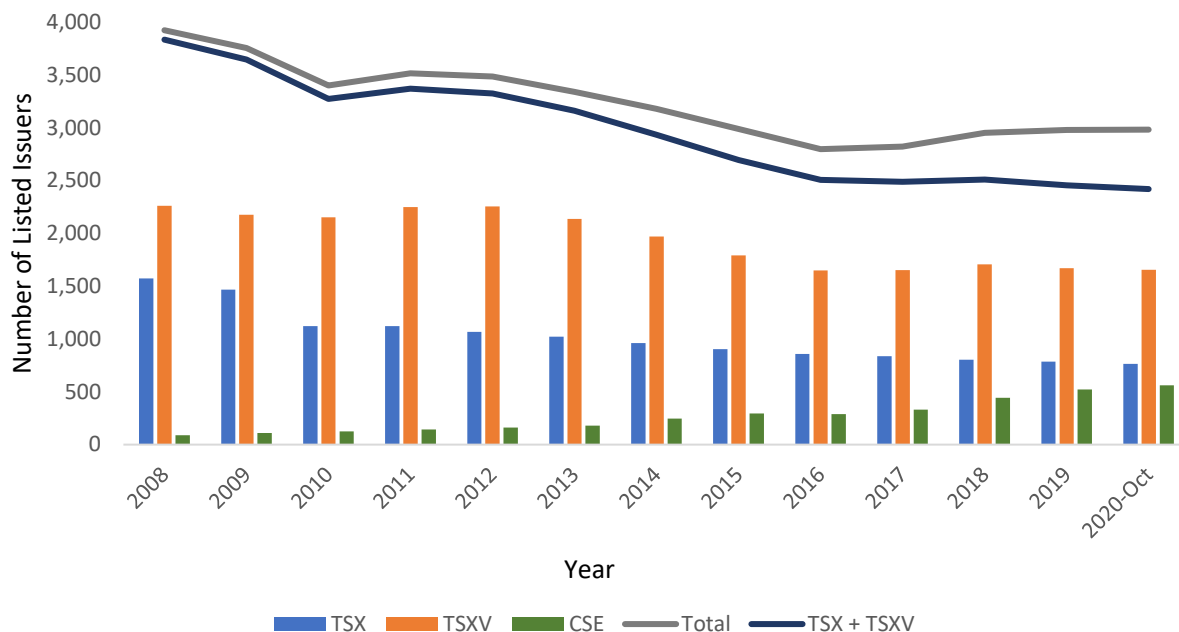
Secondary markets are where investors buy and sell securities. The secondary market functions through an efficient pricing mechanism, giving investors further opportunity to participate in growth prospects. Secondary markets can provide companies with additional capital, but are also used by institutional and retail investors to create wealth, save for retirement, and achieve other financial goals

The public markets are a great economic equalizer, allowing small retail investors, supported by appropriate investor protections, to participate directly in the growth of Ontario's economy. Strong primary and secondary markets that are transparent and liquid are a hallmark of healthy and competitive capital markets and must be safeguarded. Protecting and growing our primary and secondary markets is critical to ensuring Ontario remains a thriving capital markets jurisdiction.

⁶ Ontario Economics Accounts. (2020).

The decline of primary markets

In the past two decades, the total number of listed issuers in Canada has declined.

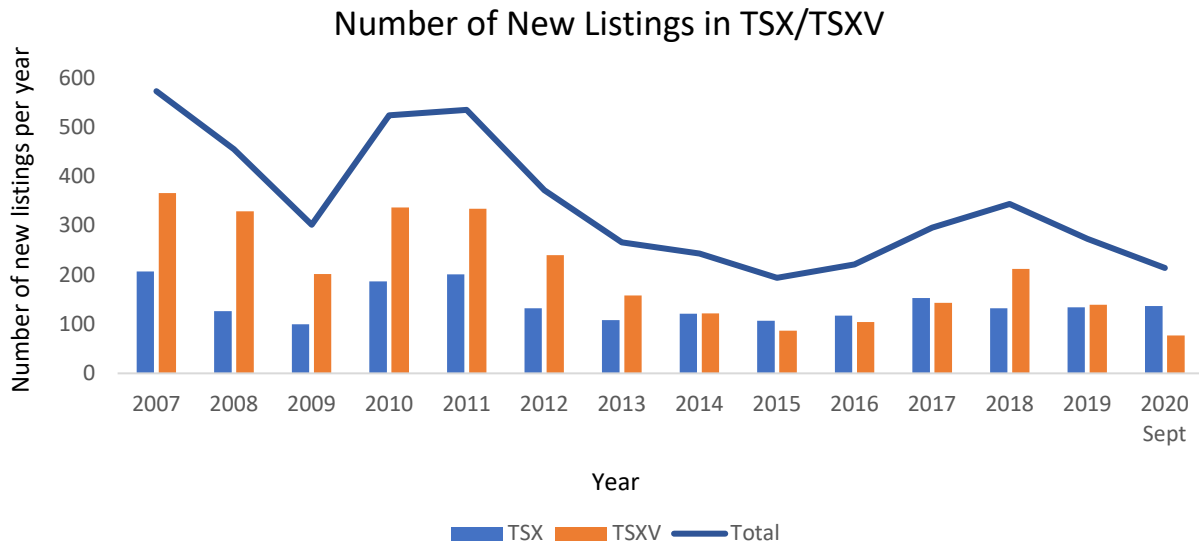


Notes: Data in the graph excludes exchange-traded funds, closed-end funds and other structured products. Annual listing numbers are reported as of December for TSX and TSX Venture (TSXV) issuers and as of January the following year for CSE issuers.^{7,8}

Trends show a noticeable decline of primary market activity in Canada. Apart from the overall number of listed issuers declining throughout the years, the number of new listings per year has also declined. Although the TSXV has had an increase in capital pool company/special purpose acquisition company activity between the years of 2015 and 2018, new listings in other sectors, in general, have stabilized or declined.

⁷ TMX Group. (n.d.) Market Intelligence Group (MiG) Archives. <https://www.tsx.com/listings/current-market-statistics/mig-archives>

⁸ Canadian Securities Exchange. Note: The Ontario Securities Commission reached out to the Canadian Securities Exchange for this data.



Note: Data in the graph includes IPOs, capital pool company/special purpose acquisition company IPOs, qualifying transactions, qualifying acquisitions, reverse takeovers, graduates and others.⁹

In particular, the annual number of new listings on the TSXV has dropped from 337 in 2010, to 77 as of September 2020. In 2010, there were 187 new listings per year on the TSX, compared to 137 as of September 2020. From stakeholder feedback, the Taskforce heard that the cost to access public markets is a significant barrier to capital raising, especially for smaller issuers and entrepreneurs.

Filing an initial public offering (IPO) prospectus can be exceptionally costly, with many fixed costs. This disproportionately impacts smaller companies. For example, when a company chooses to list on the public markets, it uses the services of investment dealers that charge underwriting fees. Apart from underwriting fees, companies must also pay the associated legal, accounting and numerous other “friction” costs. Costs may increase significantly depending on the complexity or novelty of the IPO.

After the initial cost and resourcing pressures, public companies experience ongoing regulatory reporting requirements, with costs varying between venture and senior issuers. Listed companies are subject to greater disclosure requirements and regulatory and public scrutiny regarding their business, operations and financial results, share price movements, management and director performance, executive compensation, corporate governance practices and insider reporting.

Instead of proceeding through the traditional route to list publicly, emerging companies are increasingly relying on the availability of alternative sources of funds, such as angel investors, venture capital and private equity, often to avoid the significant costs and compliance that comes with public funding. Among other consequences, this reduces the opportunity for direct retail investor participation in the economic growth of our province.

⁹ TMX Group. (n.d.).

Conversely, there has been a significant increase in the number of exchange-traded funds (ETFs). In just the last decade, ETFs in Canada have grown eightfold from 110 regular class ETFs listed in 2009, to 877 as of 2019.¹⁰ Assets under management have grown steadily with a 20 per cent cumulative annual growth rate, from \$32 billion in 2009 to \$205 billion in 2019.¹¹

Although ETFs have a comparatively small market share compared to the Canadian mutual fund industry, they outsold mutual funds for two years in a row in 2019.¹² These milestones show that investors are using ETFs as strategic long-term products.

The rise of the private markets

Globally in the last decade, private market assets have increased by 170 per cent and the number of active private equity firms has doubled during the same period.¹³ Since 2014, there have been numerous multi-billion-dollar buyouts of Canadian-based companies, including several public companies. Private capital has acquired many potential IPO candidates by offering higher valuations.

For sophisticated investors, the private markets have become an important element of portfolio diversification, given the opportunities to earn higher returns than in the public markets. Over the past decade, private equity has outperformed its public market equivalents by most measures.¹⁴ For example, private equity firms have returned about 13 per cent over the last 25 years while the S&P 500 has returned approximately 9 per cent over the same period, making private equity attractive investment vehicles for sophisticated investors.¹⁵

Apart from the lower cost to accessing private markets, company shareholders with the greatest decision-making powers also elect to remain private to maintain control, maximize returns, or seek exit or cash-out options outside of public markets. The increased allocation of capital to private markets and the growth of alternative exit options have reduced the demand for IPOs.

¹⁰ National Bank of Canada. (2020). December and full-year 2019: A decade of investment milestones. http://www.cetfa.ca/files/1578316922_Year%20End%202019.pdf

¹¹ National Bank of Canada. (2020).

¹² National Bank of Canada. (2020).

¹³ McKinsey & Company. (2020). A new decade for private markets: McKinsey global private markets review 2020. <https://www.mckinsey.com/~media/mckinsey/industries/private%20equity%20and%20principal%20investors/our%20insights/mckinseys%20private%20markets%20annual%20review/mckinsey-global-private-markets-review-2020-v4.ashx>

¹⁴ McKinsey & Company. (2020).

¹⁵ Almazora, L. (2019, November 7). How NEO is taking the fight to investment inequity. Wealth Professional. <https://www.wealthprofessional.ca/archived/how-neo-is-taking-the-fight-to-investment-inequity/321649>

Exempt market activities

Exempt markets are private markets where securities can be sold without filing a prospectus.

The Ontario Securities Commission (OSC) recently published a report highlighting the following key trends in Ontario's exempt market:¹⁶

- In 2019, approximately 3,200 corporate issuers from Canada, the United States and other foreign countries reported \$88.6 billion in capital raised from approximately 35,200 Ontario investors through prospectus-exempt distributions.
- The accredited investor (AI) exemption was the most used exemption in 2019, with 9 in 10 Canadian and foreign issuers relying on this exemption, which accounted for 95 per cent of the gross proceeds invested by Ontario investors.
- Other exemptions such as the offering memorandum (OM), family, friends and business associates (FFBA), and existing securities holder exemptions, have been used by over 1,300 issuers to raise just over \$1 billion from 2017 to 2019.

Institutional investors, unlike individual investors, often easily meet the requirements to invest in exempt market products. In 2019, institutional investors were the predominant source of capital (96.3 per cent) in Ontario's exempt market, investing approximately \$85.3 billion, although they only represented approximately 20 per cent of investors.

Most investors in the exempt market are individuals, with the number of individual investors growing year-over-year. Trends indicate that individual investors allocate most of their capital to Ontario or Canadian-based issuers (81 per cent), in contrast to institutional investors who allocate most of their capital to foreign issuers (63 per cent). Overall, Ontario-based issuers accounted for approximately 65 per cent of the gross capital proceeds raised by Canadian issuers.

Importantly, most individual investors do not qualify to purchase exempt or private market products unless they meet certain criteria that demonstrate they can accept the investment risks. This is because most individual investors do not possess the financial capacity or risk tolerance to safely participate in the higher-risk exempt markets.

¹⁶ Ontario Securities Commission. (2020). Ontario's exempt market: A review of capital raised in Ontario through prospectus exemptions since 2017. https://www.osc.gov.on.ca/documents/en/Securities-Category4/sn_20201210_45-717_ontario-exempt-market.pdf

Decline in active independent investment dealers

Independent investment dealers play a key role in marrying capital with issuers, particularly with respect to venture opportunities, thereby playing a central role in the incubation and growth of the primary market. Given the higher risk profile that smaller companies typically exhibit, smaller intermediaries play an important role in early-stage capital-raising activities that smaller companies undertake.

The decline in small and medium-sized investment dealers has been attributed, in part, to the rise of large financial intermediaries in Canada with inherent competitive advantages, making it difficult for smaller intermediaries to compete.¹⁷ Smaller intermediaries work to match early-stage companies with early-stage capital. However, once such high-risk smaller companies grow to a level where their business and revenue stream is seen as less risky, larger investment dealers can leverage their extensive suite of services and capital resources to attract these companies away from smaller intermediaries.

This competitive dynamic has negatively impacted the ability of smaller intermediaries to continue providing services in Ontario's capital markets. It has led to a decline in the number of smaller intermediaries, with an accompanying decline in new issuers. The decline of smaller investment dealers leaves a supply gap in our capital markets to meet the needs of small, higher-risk entrepreneurial companies to raise capital in the early stages of their business.

Opportunities in the market for retail fund products

There are approximately 60,000 different investment products held by clients through the Mutual Fund Dealers Association of Canada (MFDA) channel.¹⁸ Currently, the majority of the distribution of investment products to investors is through bank-owned shelf distribution channels. Bank-owned shelf distribution channels are generally sold by deposit-takers and approximately 95 per cent of deposit-takers' mutual fund assets under administration are comprised of proprietary mutual funds.¹⁹

A broad array of available products, both proprietary and independent, is essential to increase profit opportunities for businesses and investors. Additionally, increasing the variety of products increases competition and innovation in the secondary market space. The Taskforce has heard concerns that bank-owned shelves incentivize the sale of proprietary products and restrict access to other independent products, which may particularly affect smaller independent manufacturers.

¹⁷ Investment Industry Association of Canada (IIAC). (2020, January). Structural change in investment industry will break loose this coming year as competitive conditions intensify. *Letter from the President*, 131. <https://iiac.ca/wp-content/uploads/Letter-from-the-President-Vol.-131.pdf>

¹⁸ Mutual Fund Dealers Association. (2020). Client research report 2020. https://mfda.ca/wp-content/uploads/2020_ClientResearchReport-1.pdf

¹⁹ Mutual Fund Dealers Association. (2017). 2017 MFDA Client Research Report. https://mfda.ca/wp-content/uploads/2017_MFDA_ClientResearchReport.pdf

Competition and innovation

Competition is critical to fostering fair and efficient capital markets. Investors benefit from healthy competition by way of better and innovative products and lower fees. By fostering capital formation and competition, businesses of all sizes can thrive, find creative solutions to industry concerns and challenges, increase economic growth and promote capital markets that are nimbler and more innovative.

A more competitive framework would help Ontario's capital markets become a more attractive marketplace to investors and would help stimulate economic growth. Assessing other countries' innovative efforts and best practices would assist Ontario in developing new, innovative ideas for job growth and economic sustainability.

Leading international jurisdictions have introduced regulatory sandboxes that have the potential to spur innovative ideas. These sandboxes allow companies to test their novel ideas in a light-touch but controlled regulatory environment, while ensuring appropriate investor protection.

Recently, financial technology (FinTech) emerged as competition to traditional and incumbent financial services. For example, crowdfunding platforms supplanted some traditional financial intermediaries by allowing peer-to-peer money exchange with minimal advice to investors. Robo-advisors facilitated a new, electronic medium for easy access to diversified portfolio services. Cryptocurrency has the potential to disrupt the intermediary role of traditional banks. However, similar to other FinTech, cryptocurrency is largely unregulated and does not provide the same quality of investor protection as other investments. Such new emerging trends will need to be incorporated into regulatory frameworks, potentially initially through regulatory sandboxes and eventually through formal regulation.

Legislation, rules and policies need to be flexible enough to respond to, but not stifle, technological innovation, while still adequately protecting investors and maintaining confidence in the capital markets. Aspiring to a more optimal balance between innovation and regulation is necessary for Ontario's capital markets to succeed in the future.

Increased investor interest in environmental, social and governance (ESG) factors

Recently, capital markets across the world have seen a rise in ESG-driven investing. 98 per cent of Canadian institutional investors expect ESG-integrated portfolios to perform on par or better than those that do not integrate ESG factors.²⁰ Evidence suggests that the inclusion of ESG criteria positively correlates to investment performance, which has prompted greater transparency and interest in ESG policies.²¹ Recently, four global accounting firms — Deloitte, PwC, EY and KPMG — were among the world’s largest companies in the International Business Council to adopt ESG standards for their 2021 reporting.²²

A recent survey of institutional investors, consultants and investment professionals from RBC Global Asset Management, listed the top ESG concerns for investors as corruption, climate change risk and shareholder rights.²³ Additionally, the survey showed that the COVID-19 pandemic has raised investor consideration around labour relations, supply chains and diversity.²⁴ Greater ESG disclosure helps investors understand not only potential risks for the issuer but also the opportunities.

Progress in achieving diversity

There has been an increase in attention to diversity on boards and executive positions, both domestically and internationally. Greater corporate diversity does not just address long-standing inequities — it may improve governance and business decisions by helping to identify a variety of issues and concerns.

From 2015 to 2019, the percentage of women on corporate boards rose by only 9.3 per cent to 27.6 per cent and the percentage of women on executive teams rose only 2.9 per cent to 17.9 per cent.²⁵ The Multilateral CSA review in 2019 of a sample of 641 TSX-listed issuers showed 17 per cent of board seats were held by women and 64 per cent of issuers had at least one woman in an executive officer position.²⁶

²⁰ Royal Bank of Canada. (n.d.). Our latest independent research: Responsible investment: Global adoption – regional divide. RBC Global Asset Management. <https://www.rbcgam.com/en/ca/about-us/responsible-investment/our-latest-independent-research>

²¹ World Economic Forum. (2020, September). Measuring stakeholder capitalism towards common metrics and consistent reporting of sustainable value creation. http://www3.weforum.org/docs/WEF_IBC_Measuring_Stakeholder_Capitalism_Report_2020.pdf

²² Ward, M. (2020, September 22). ‘The time is now,’ says EY CEO Carmine Di Sibio, as the Big Four corporate accounting firms get serious about ethical governance and endorse official ESG reporting standards. Business Insider. <https://www.businessinsider.com/big-4-deloitte-pwc-ey-kpmg-announce-esg-reporting-standards-2020-9#:~:text=Leaders%20of%20Deloitte%2C%20PwC%2C%20EY,Financial%20Times'%20Gillian%20Tett%20reports.&text=As%20of%20June%202019%2C%20more,using%20ESG%20standards%2C%20per%20Forbes>

²³ Langton, J. (2020). Canadian institutional investors have high hopes for ESG portfolios. Investment Executive. https://www.investmentexecutive.com/news/research-and-markets/canadian-institutional-investors-have-high-hopes-for-esg-portfolios/?utm_source=newsletter#038;utm_medium=nl&.

²⁴ Langton, J. (2020).

²⁵ Catalyst & 30% Club. (2020). Women in leadership at S&P/TSX companies. https://www.catalyst.org/wp-content/uploads/2020/03/Women-in-Leadership_SP_TSXCompanies_report_English-Final-1.pdf

²⁶ Canadian Securities Administrators. (October 2019). Report on Fifth Staff Review of Disclosure Regarding Women on Boards and in Executive Officer Positions. https://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20191002_58-311_staff-review-women-on-boards.pdf

In the past number of years, the idea of diversity has expanded beyond gender diversity. Recent amendments to the *Canada Business Corporations Act* (CBCA) require corporations to report on representation of, at minimum, the following groups: women, Indigenous peoples, persons with disabilities and members of visible minorities.²⁷ In a 2020 review by Osler, Hoskin & Harcourt LLP, 213 CBCA companies disclosed the number of visible minorities, Indigenous peoples and/or persons with disabilities serving on the board. Among these 213 companies, 5.5 per cent of board positions were held by members of visible minorities, 0.5 per cent of board positions were held by Indigenous peoples and 0.4 per cent of board positions were held by persons with disabilities.²⁸ The data suggests that there is room to improve diversity in our capital markets.

Indeed, there is an expectation for action. A survey of 500 capital markets professionals, completed by Women in Capital Markets and the Canadian Association of Urban Financial Professionals, found that 92 per cent of respondents supported targets for women and Black, Indigenous and people of colour (BIPOC) on boards and executive management positions.²⁹ However, improving representation of women and racialized persons in capital markets overall has been slow, particularly in board and executive positions.

Then and Now: S&P/TSX Composite Index over 5 years³⁰

S&P/TSX Composite Index	2015	2019
Number of companies	240	234
Per cent of women on boards	18.3%	27.6%
Per cent of women on executive teams	15.0%	17.9%

Increased shareholder activism

In addition to the rise of institutional shareholder activism in areas such as board diversity and ESG matters, there has been increased operational and transactional activism by former insiders and professional activists (i.e., hedge funds). Activists often challenge boards and management in the market for corporate influence by putting forward board nominees and strategic alternatives for shareholder approval. By providing shareholders with an alternative to existing boards and management, activists can improve public company performance. However, there are concerns that activists are too short-term focused and may exploit regulatory gaps in advancing their claims.

²⁷ Government of Canada. (2019, July 18). Diversity disclosure for boards of directors and senior management comes into force. <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs08317.html>

²⁸ Osler, Hoskin & Harcourt LLP. (2020, October). 2020 Diversity Disclosure Practices. <https://www.osler.com/osler/media/Osler/reports/corporate-governance/Diversity-and-Leadership-in-Corporate-Canada-2020.pdf>

²⁹ Women in Capital Markets & Canadian Association of Urban Financial Professionals. (2020, August). Targets: Capital markets are ready WCM quick-hit research corporate board diversity in Canada. <https://wcm.ca/files/about/WCM-Research-Targets-for-Corporate-Board-Diversity.pdf>

³⁰ Catalyst & 30% Club. (2020).

The need for enhanced enforcement and investor protection

Currently, it is difficult for investors who fall victim to financial misconduct, such as misleading sales practices, fraudulent investment scams and unsuitable investment advice to seek redress. In many cases, harmed investors have difficulty navigating a complex and fragmented regulatory framework. This leads to lost confidence in the integrity and fairness of the capital markets and the ability of regulatory bodies to provide meaningful investor protection.

Based on feedback from stakeholders, the Taskforce notes the need for a strengthened enforcement framework in Ontario. There is a perception that Ontario's capital markets regulatory regime is not stringent enough with respect to white-collar crime and that bad actors in comparable jurisdictions face enforcement action earlier, which can hurt investor confidence. Limitations on enforcement can deter investments in Ontario's

“Public concerns about the effectiveness of enforcement of securities laws...are aggravated by the fact that in most cases the victims recover very little or none of their losses. This can lead to lost confidence in the integrity and fairness of the capital markets and the ability of regulatory bodies to provide meaningful investor protection.”

Canadian Foundation for Advancement of
Investor Rights (FAIR Canada)

capital markets, driving competition and innovation elsewhere. Healthy and thriving capital markets balance competition, growth and innovation with investor protection. Strengthened enforcement instills confidence in our capital markets and attracts investment, which plays a key role in our economic growth.

COVID-19 pandemic impact on the markets

Governments around the world have been working to stimulate global and domestic economies, create jobs and help sustain businesses that have been impacted by the COVID-19 pandemic. Several industry sectors such as manufacturing, travel, hospitality, entertainment and recreation have experienced a decline in their growth compared to last year. The number of initial public offerings (IPOs) worldwide declined by 19 per cent and proceeds decreased by 8 per cent in the first half of 2020 compared to the first half of 2019. The number of IPOs and proceeds in the North, Central and South American regions declined by 30 per cent over the same period.³¹

Studies have shown a significant increase in the risk and volatility of the U.S. stock market and other capital markets around the world, with early results showing that changes in volatility are more sensitive to COVID-19 news than other economic indicators.³² Volatility in capital markets also affected small businesses because investors are continually more risk-averse, given the unpredictable returns.

³¹ EY Canada. (2020). Is your equity story adapting to the new norm? Global IPO trends: Q2 2020. https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/growth/ey-q2-2020-global-ipo-trends-report-v1.pdf

³² Baek, S. et al. (2020). COVID-19 and stock market volatility: An industry level analysis. *Science Direct*. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7467874/>

COVID-19 has delayed companies' ability to hold in-person annual general meetings (AGMs) and has resulted in more virtual AGMs. The Canadian Securities Administrators (CSA) have provided guidance on holding virtual and hybrid AGMs, while other regulatory agencies continue to provide relief and flexibility towards virtual and deferred meetings.

In addition, enforcement activities have gone virtual. The OSC published the "Guide to Virtual Hearings Before the OSC Tribunal" which provides general information about the conduct of virtual hearings.³³ The OSC also released a series of temporary orders providing relief from various filings and the accrual of late fees to assist market participants with meeting their regulatory obligations during these unprecedented times.

COVID-19 amplified the need for greater digital participation in financial services. Finding long-term economic solutions will be dependent on digital proficiency and the ability to adapt to new changes in a digitally dominant, fast-paced capital markets environment.

"The pandemic has forever changed the way consumers think, behave and financially transact. While Canadians continue to struggle with financial insecurity due to widespread job loss and business disruption remains unabated, the response of Ontario's Ministry of Finance to this unprecedented challenge has the potential to not only pivot the economy skyward but to completely revitalize the financial sector if the right strategies are applied."

Questrade

The importance of a modernized capital markets regulatory framework

Market trends and changes since the 2008 financial crisis and the overall economic impact of COVID-19 have reinforced the need to assess and seek ways to modernize Ontario's capital markets regulatory structure. An effective capital markets regulator with a modernized governance structure and mandate supports Ontario's overall economic recovery plan in a post-pandemic world. The modernization of the capital markets regulatory framework will better position Ontario to attract capital investment, help businesses grow and instill market confidence.

Cooperative Capital Markets Regulatory System (CCMR) initiative

The Taskforce is mindful of the important work being done by all the participating governments and the Capital Markets Authority Implementation Organization to establish the CCMR. As part of CCMR, Ontario is working with its partners towards the establishment of a new Capital Markets Regulatory Authority (CMRA), a single regulator operating in all participating jurisdictions. CCMR would increase harmonization in capital markets regulation and enhance investor protection by providing for stronger enforcement in capital markets.

However, given the urgent need for modernization in Ontario's capital markets, the Taskforce is putting forward recommendations that will improve Ontario's capital markets, in advance of future progress on the CCMR initiative. The Taskforce encourages participating jurisdictions to consider carrying forward its recommendations and adopting them as part of CCMR.

³³ Ontario Securities Commission. (2020). Guide to virtual hearings before the OSC Tribunal. https://www.osc.gov.on.ca/documents/en/Proceedings/tribunal_guide-virtual-hearings-before-osc-tribunal.pdf

1.3 Stakeholder Feedback

From February to the end of June 2020, the Taskforce met with over 110 stakeholders to elicit preliminary feedback on the challenges faced by businesses and investors in our capital markets ecosystem. The Taskforce published the *Capital Markets Modernization Taskforce Consultation Report* in July 2020 to seek further stakeholder feedback.

By the time the comment period closed in September 2020, the Taskforce had received feedback from more than 130 stakeholders and held numerous follow-up discussions with stakeholders.³⁴ Throughout the preliminary feedback and consultation process, each Taskforce member also met with stakeholders individually. These stakeholders included capital markets regulators, stock exchanges, financial institutions, industry associations, independent and bank-affiliated dealers, law firms, issuers, and investor advocacy groups. Stakeholder feedback was instrumental in developing the Taskforce's final recommendations.

Throughout the consultation period, stakeholders provided more than 130 detailed responses to the Taskforce's proposals and offered comprehensive feedback for the Taskforce to consider in preparation for its final recommendations. Overall, stakeholder comments covered a broad set of themes related to the capital markets, including, but not limited to, the following:

- Improving corporate and regulatory governance structures to improve efficiency and effectiveness;
- Re-invigorating the intermediary sector and improving capital-raising opportunities, particularly for smaller issuers;
- Creating a flexible regulatory framework that is adaptable to changing conditions;
- Facilitating a level playing field between large and smaller market participants;
- Reducing regulatory burden and streamlining processes/requirements to save businesses' resources;
- Enhancing investor protection to instill confidence in Ontario's capital markets and attract investments;
- Encouraging innovation in the sector that will ultimately benefit businesses and investors alike;
- Ensuring enforcement practices and procedures are effective; and
- Aligning final recommendations, where possible, with other regulatory jurisdictions.

³⁴ Capital Markets Modernization Taskforce. (2020, July).

2.0 Key Recommendations

1. Introduce the *Capital Markets Act* in Ontario as the legislative vehicle to implement the Taskforce's recommendations

The implementation of the Taskforce's final report would require major changes to Ontario's current capital markets legislation. These new changes would fit better within a modern Act than within the current outdated legislation structure that is split between the *Securities Act* and the *Commodity Futures Act*.

Ontario is currently well advanced in drafting an entirely new capital markets legislation under CCMR. The draft proposed *Capital Markets Act* (CMA), a modern statute replacing the *Securities Act* and *Commodity Futures Act* has been substantially developed as part of the ongoing work to develop the CCMR. The draft CMA was published for public comment in 2014 and 2015 and was updated based on comments received.³⁵

Recommendation:

Implementing the Taskforce's recommendations would require new, modernized legislation that reflects these significant policy changes and is flexible enough to respond to future capital markets issues in a timely manner. To this end, the Taskforce recommends introducing an Ontario version of the draft CMA.

Using the draft CMA, with an accompanying statute setting out a modernized governance and structure for the OSC, as the legislative vehicle to implement the Taskforce's recommendations would result in new, modernized legislation in Ontario. The draft CMA uses modern legislative drafting and promotes regulatory flexibility to respond to market developments. It would facilitate the implementation of the Taskforce's recommendations in this report and would avoid the duplicative work of making significant amendments to the *Securities Act* and the *Commodity Futures Act*, which would later need to be reflected in the draft CMA.

Subject to the Legislative Assembly of Ontario enacting the Ontario CMA, the Ministry of Finance should work with the OSC towards implementing the Ontario-version of the CMA by the end of 2021.

³⁵ Cooperative Capital Markets Regulatory System. (2015, August). Capital Markets Act: A revised consultation draft. <http://ccmr-ocrmc.ca/wp-content/uploads/CMA-Consultation-Draft-English-August-2015.pdf>

2.1 Improving Regulatory Structure

The Taskforce proposes a series of recommendations to create a more modern and efficient securities regulator and a nimble capital markets regulatory framework that addresses market participants' concerns. The role of the regulator should not only focus on policing, but also on the incubation of a diverse and thriving capital markets. A fair and efficient capital markets must balance streamlined regulation and enhanced enforcement. As the capital markets and regulatory landscape have evolved, stakeholders have voiced the need to enhance corporate and regulatory governance structures to align with global governance best practices. To achieve these objectives, we propose changes to the structure of the current securities regulator that modernize the strategic, regulatory and operational management of the regulator. More specifically, the splitting of the OSC Chair and CEO positions and the separation of the regulatory and adjudicative functions at the OSC would enhance corporate governance and provides opportunities for greater strategic focus.

“From a governance perspective, separating the Chair and CEO roles at the OSC diminishes any appearance of a conflict of interest where the roles are combined. ... Separating the adjudication from the regulatory role of the OSC is also good governance practice — the important issue is the independence of the functions.”

Portfolio Management Association of Canada

Stakeholders support the capital markets regulator playing a greater role in facilitating economic growth in Ontario. Furthermore, given the ongoing COVID-19 pandemic, regulators must adapt more quickly to technological advancements. An expansion of the OSC's mandate to include fostering capital formation and competition will facilitate a more flexible regulatory framework.

One of the most pressing concerns that stakeholders raised is the regulatory fragmentation of capital markets in Canada. To address these concerns, the Taskforce has recommended a single self-regulatory organization (SRO) that can eventually oversee all advisory firms under a strengthened accountability framework.

Ontario Securities Commission (OSC) Governance

2. Expand the mandate of the OSC to include fostering capital formation and competition in the markets and change the name of the Ontario Securities Commission to Ontario Capital Markets Authority

The OSC's mandate is to provide protection to investors from unfair, improper or fraudulent practices; foster fair and efficient capital markets and confidence in capital markets; and contribute to the stability of the financial system and the reduction of systemic risk.

Expanding the mandate aims to augment the regulatory policing function with a public policy imperative of growing the capital markets in Ontario. This change, alongside other recommendations, will lead to institutional and cultural transformation at the OSC. This, in turn, will lead to a more vibrant capital markets, fueled by innovation, competition and diversity. Other securities regulators, such as the U.K. Financial Conduct Authority, the Australian Securities and Investments Commission, and the Monetary Authority of Singapore, have a capital markets growth and competition mandate, which allows these regulators to address systemic barriers to growth, including over-regulation, fees and anti-competitive behaviour.

In consultations undertaken by the Taskforce, stakeholders noted that expanding the OSC's mandate could help spur economic growth in Ontario and support the regulator in dealing with rapid technological changes. Furthermore, so long as the regulator's mandate continues to uphold investor protection, these updates could help the OSC address aforementioned barriers, including anti-competitive behaviour.

With the transformative changes to Ontario's capital markets regulatory framework and mandate, it is time to reassess the organization's name and branding to be more reflective of a diverse capital markets sector.

Recommendation:

Given the significant role the OSC plays in relation to the vitality of the capital markets and investments in Ontario's businesses, a legislative amendment to incorporate the fostering of capital formation and competition in the capital markets to the OSC's mandate would encourage economic growth and help facilitate capital raising. These additions to the OSC's mandate will not detract from the OSC's existing mandate, including but not limited to maintaining investor protection.

The Taskforce is also recommending changing the name of the OSC to the *Ontario Capital Markets Authority*. *Ontario Capital Markets Authority* is a name that is direct yet flexible enough to encompass all the regulatory activities that the organization undertakes now and in the future.

The change in name will encompass the entire capital markets sector and will reiterate the significant changes proposed within the organization, including the expansion of the organization's mandate, the significant changes to its regulatory structure and efforts to modernize the system.

3. Separate the current combined Chair and Chief Executive Officer position into two distinct positions

In Taskforce consultations, stakeholders indicated that the OSC's current governance structure impedes its role as a modern and globally competitive capital markets regulator. While Canadian securities commissions have traditionally been structured with a combined Chair and Chief Executive Officer (CEO) position, separating these positions would support a more effective delivery of the OSC's mandate. An example is the recently established Financial Services Regulatory Authority of Ontario (FSRA) with separate Chair and CEO positions.

Reforming the governance structure at the OSC would create a modern regulator with a Board Chair focused on strategic oversight and corporate governance, and a CEO focused on the execution of the mandate and operational management of the regulator. This proposal has been recommended by several previous expert panels.³⁶ In addition, separating the Chair and CEO positions is an enabling step in reorganizing the separation of the OSC's regulatory and tribunal functions.

Recommendation:

The Taskforce recommends the following:

1. Separation of the Current Combined Chair and CEO Position

The current combined Chair and CEO position be separated into two distinct positions.

- The Board of Directors, led by the Chair, would focus on the strategic oversight and corporate governance of the regulator.
- The CEO would be responsible for the overall management of the organization and execution of the OSC's mandate.

2. Appointment of the CEO

The CEO's focus would be on the day-to-day regulatory oversight and the operations of the regulator, including the power for the CEO or a delegate to make investigation orders (see recommendation below).

- The CEO would be on the Board of Directors with voting rights.
- The first CEO would be appointed by the Lieutenant Governor in Council, on the recommendation of the Minister of Finance. The CEO would report to the Board of Directors.
- Subsequently, the CEO would be appointed by the Board of Directors and would report to the Board of Directors.

The Taskforce envisions the CEO would act as a representative/spokesperson for the OSC in negotiations and consultations with stakeholders such as the CSA, the International Organization of Securities Commissions and other capital markets regulators.

³⁶ Capital Markets Modernization Taskforce. (2020, July).

3. CEO as Head of the Institution under Freedom of Information and Protection of Privacy Act (FIPPA)

Currently, under FIPPA regulations, the Minister is the head of the institution of the OSC and Ministry of Finance staff work with the OSC to manage FIPPA access requests. Pursuant to FIPPA, the head of an institution (such as the OSC) is responsible for overseeing administration, ensuring compliance, and making decisions regarding FIPPA.

The Taskforce recommends that under the proposed new governance structure, the OSC CEO be designated as the head of the OSC for FIPPA purposes. This is consistent with the approach taken when FSRA was established in 2019, as well as at other government agencies, and would supplement the new governance structure proposed for the OSC. Giving this responsibility to the OSC CEO would be appropriate and improve administrative efficiency. It would reduce the need to share records of market participants beyond the OSC.

4. CEO to Make and to Delegate the Power to make Investigation Orders

Under current securities laws, any OSC Commissioner can make investigation orders but s.6(3) of the *Securities Act* prohibits the Commission from delegating this power. This results in the Commissioner who made the order becoming conflicted out of any subsequent hearing related to the investigation order. To avoid this challenge, the OSC Chair and CEO within the current structure usually makes investigation orders because he/she does not sit on hearing panels. However, this can be logistically challenging if the OSC Chair and CEO is unavailable to make investigation orders.

The Taskforce recommends making legislative amendments to allow the OSC CEO or a delegate to make investigative orders. This would be aligned with many other Canadian jurisdictions, namely, Alberta, New Brunswick, Northwest Territories, Nunavut, Prince Edward Island and Yukon, where the investigation order-making powers of capital market regulators can be delegated.

4. Separate regulatory and adjudicative functions at the OSC

Canadian securities commissions have traditionally been structured as multi-functional administrative agencies, acting jointly as regulator and adjudicator. Members of the Commission serve an initial appointment for a term of up to two years, with the potential for extensions. Members of the Commission are part-time, while the current Chair & CEO and the Vice-Chairs are full-time Members. Part-time Members are independent of management and devote as much time as needed to perform their duties.

Stakeholders indicated in our consultations that the OSC's corporate governance would be strengthened by establishing clear boundaries between the regulatory and adjudicative decision-making functions of the regulator. There is a growing consensus among policymakers, legal experts, and previous expert panels that a bifurcated model that clearly delineates regulatory and adjudicative functions aligns with best practices in leading corporate governance structures. Stakeholders also have noted that the current two-year term restricts their ability to effectively adjudicate and does not provide enough incentive to attract and retain talent.

The Society of Ontario Adjudicators and Regulators generally indicate that five-year terms, set by statute, would reduce uncertainty and promote the efficient use of resources, ensure consistency, continuity and legacies of expertise.³⁷

Recommendation:

The Taskforce recommends through legislative amendments, the following:

1. Separate Adjudicative Tribunal

A separate adjudicative tribunal be established within the current OSC structure with the creation of a Chief Adjudicator position to lead the newly created tribunal, with no tribunal members serving on the Board of Directors.

- The new tribunal would be operated as a separate function within the OSC.
- Further, a Tribunal Secretary and Adjudicative Office would be established reporting to the Chief Adjudicator to support administering the mandate of the tribunal.
- This approach is similar to the approach taken with the Ontario Energy Board, which also created a separate tribunal within the organization, and also similar to the approach that was developed under CCMR.
- The Chief Adjudicator would determine the composition of adjudicative panels depending on the nature, complexity, scheduling and other necessary considerations for each case. In that regard, if particular expertise is needed for a matter, industry experts could be appointed by the Lieutenant Governor in Council (LGIC) as additional part-time tribunal members to be called upon when needed.

Persons directly affected by a final decision of the new tribunal, as well as the CEO, would have a right to appeal the final decision to the Divisional Court (see the Recommendation 6 below regarding the standard of review for such appeals below).

2. Tribunal Establishment

The Chief Adjudicator and the other tribunal members be appointed directly by the LGIC, on the recommendation of the Minister of Finance.

- Individuals appointed to the tribunal should have the requisite experience and ability to conduct adjudicative proceedings effectively.
- The Chief Adjudicator would report to the Board with respect to operational and administrative matters of the tribunal and would not otherwise participate in Board meetings.
- The Chief Adjudicator would not report to the Board on matters related to adjudicative proceedings (other than providing information on proceedings once they have been completed).

³⁷ Society of Ontario Adjudicators and Regulators. (2018, July). Statement of principles for the appointment of adjudicative tribunal members. <https://soar.on.ca/sites/default/files/article/SOAR%20Statement%20of%20Principles%20of%20Appointment%20July%202018.pdf>

Establishing the tribunal within the OSC would facilitate an independent tribunal focused solely on adjudicative proceedings, while maintaining the appropriate level of internal exchange of policy and regulatory developments, industry trends, and budgetary information between the tribunal and the OSC's regulatory and board functions. This separation would help ensure that tribunal decisions are informed by, but not directed by policy decisions.

Establishing an internal tribunal with its own tribunal staff and members would be a cost-effective, timely and logistically simpler path forward to achieve the Taskforce's policy objectives as compared to establishing an external tribunal. In addition, this approach would ensure the minimal disruption of ongoing adjudicative matters.

3. Tribunal Members' Term

To better attract and retain talent and create greater continuity, the Taskforce is recommending extending the initial term of appointment for Tribunal members to up to five years. By extending the initial term to up to five years, the OSC will attract experienced and skilled Tribunal members who can, among other things, commit to lengthy hearings, as necessary, and continue to develop their capital markets expertise.

5. Ensure the securities regulatory framework and OSC's regulatory functions are reviewed periodically

The existing *Securities Act* provides that the Minister should appoint an advisory committee to review the legislation, regulations and rules related to OSC matters periodically. However, the last review of Ontario's securities legislation and regulation was conducted 17 years ago in 2003.

Reviewing provisions in Ontario's legislation is considered an important oversight mechanism for the rule-making and self-governing powers OSC has been given.

There have been concerns that the OSC, an administrative body, was given rule-making authority that has the force of law without periodic review of those authorities — raising concerns about accountability.

Recommendation:

The Taskforce recommends legislatively mandating periodic reviews of Ontario's capital markets legislation, as well as the OSC's mandate, every five years, starting from when the legislation mandating the review comes into effect.

These policies would ensure that Ontario's capital markets legislation remains aligned with developments in the sector, and that the OSC remains a modern and sophisticated regulator with a mandate suitable for an evolving marketplace. A periodic review of the capital markets regulatory structure would increase transparency and public accountability and ensure that best practices, such as evidence-based regulation and cost/benefit analysis, are incorporated when developing regulation.

The Minister would then determine if the recommendations had been implemented in alignment with the underlying public policy objectives and could direct the OSC to take additional actions if required.

However, the Taskforce recommends that the first review assess the effectiveness of the recommendations specified below (outlined in detail later in the report) and report to the Minister within three years:

- Reduce the hold period for certain securities issued by qualified reporting issuers;
- Increase access to the shelf system for independent products;
- Prohibit tying or bundling of capital market and commercial lending services;
- Improve corporate diversity;
- Transition towards an access equals delivery model;
- Consolidate reporting requirements;
- Expedite the SEDAR+ project;
- Allowing reporting issuers to obtain beneficial ownership data;
- Ensure that OSC consults on the regulatory framework concerning the distribution of and access to equities market data; and
- Designate a dispute resolution service with binding decision powers.

6. Standard of reasonableness to apply to OSC tribunal decisions

In late 2019, in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, the Supreme Court of Canada (SCC) indicated that, where a legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. As a result, the standard of correctness on questions of law applies to final decisions of the OSC, whereas in the past the usual standard of review for appeals to the Divisional Court on questions of law for final decisions of the OSC had been reasonableness.

Recommendation:

As the Taskforce is recommending creating a new tribunal separate from the regulatory operations of the OSC (see Recommendation 4 above), including a panel of part time adjudicators who are experts in their respective fields, it is appropriate to consider whether to legislate a standard of review that would apply to appeals to the Divisional Court of final decisions of the new tribunal.

The Taskforce recommends a legislative amendment providing that, when hearing an appeal of a final decision of the newly created OSC tribunal, the Divisional Court would apply a standard of reasonableness when reviewing final decisions of the OSC tribunal on questions of law. This recommendation will ensure that there is an appropriate degree of deference to the new OSC tribunal's expertise and that the historical status quo is preserved. In the vast majority of appeals of Commission decisions over the last twenty years, a standard of reasonableness was applied to the review.

The statutory amendment is not meant to apply to reviews relating to a breach of the principles of natural justice or the duty of procedural fairness. It would also not apply to the categories of questions

identified in the *Vavilov* decision as attracting a standard of correctness, including: (1) constitutional questions; (2) general questions of law that are of central importance to the legal system; and (3) jurisdictional boundaries between two or more administrative bodies.

7. Reduce the minimum consultation period for rule-making from 90 days to 60 days for consistency with provisions in other jurisdictions and to reduce delays

The *Securities Act* requires the OSC to provide stakeholders at least 90 days after the publication of a proposed rule to submit written comments. Providing stakeholders with a reasonable opportunity to comment on proposals is important to effective rule-making. In some instances, a longer consultation period may also be warranted. Ontario is the only jurisdiction in Canada that requires the longer minimum 90-day consultation period. The longest minimum comment period among other CSA members is 60 days.

As part of the consultation, stakeholders, including the CSA, raised concerns that the OSC's current minimum 90-day comment period results in unnecessary policymaking delays.

Recommendation:

In response to stakeholder feedback, amending securities legislation to shorten the minimum consultation period from 90 to 60 days would enhance policymaking efficiency and allow the OSC (and collectively, the CSA in cases where changes are to National Instruments) to enact timelier rule-making that would be responsive to market changes and stakeholder feedback. This would also help to align rule-making practices with other CSA jurisdictions and produce greater national harmonization.

To avoid any confusion, the recommended shortened consultation period would only apply, following a formal legislative change, to newly proposed rules that are not already in the consultation process.

8. OSC-FSRA collaboration to achieve efficiencies

The OSC and FSRA are both agencies of the Ontario government, overseeing different aspects of Ontario's financial services sector. The OSC oversees capital market participants, such as reporting issuers, investment industry intermediaries, and market infrastructure entities. FSRA, on the other hand, regulates activities of the insurance industry, credit unions and caisses populaires, mortgage brokers and pension plan administrators.

Recommendation:

Both the OSC and the FSRA should collaborate and examine potential back-office efficiency opportunities in areas such as:

- **Data centres:** Amalgamate the data centres as both regulators are moving toward cloud-based technologies.
- **Technological advancement:** Explore opportunities to work collaboratively to digitize regulatory operations and incorporate similar data analytics used for policy work, registrations and scenarios whereby the regulators are conducting oversight and investigations.
- **Call centres and websites:** Resources dedicated to call centres and operating each regulator's respective website (which are used as communication channels with investors/consumers/market participants) can be shared to reduce costs.

The Taskforce also recommends the cross-appointment of one or more individuals who sit on the Board of Directors of both regulators to develop a common strategic objective and direction where stakeholders from both regulated sectors of the industry are affected. The Taskforce encourages greater cooperation, coordination and collaboration between both regulators.

Furthermore, the OSC and FSRA should consider harmonized regulation of similar products and financial sectors to avoid regulatory arbitrage and regulatory burden.

The OSC and FSRA are both governed by boards accountable to the Minister of Finance. Both regulatory agencies are subject to the same government policies, directives and ministerial oversight, which would enable synergies and new opportunities when working in close collaboration.

SRO Regulatory Framework

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

Many dealers operate dual platforms and are jointly regulated by both the Investment Industry Regulatory Organization of Canada (IIROC) and MFDA, resulting in duplicative regulation. Given the industry's evolution, having two separate SROs with divided oversight by product is anachronistic and confusing to investors. A single SRO for all registered firms in capital markets that provide advice to investors would reduce regulatory complexity and costs, while harmonizing regulation across Canada.

Through the Taskforce's public consultations, stakeholders strongly reiterated that the regulatory framework for SROs is outdated, and that a streamlined and modern SRO regulatory framework would be responsive to investors and advisors and reduce regulatory burden.

On June 25, 2020, the CSA published a consultation paper "Consultation on the Self-Regulatory Organization Framework" as part of its ongoing process to review the regulatory framework for SROs.³⁸ The Taskforce recommends that following its consultation, the CSA adopts the Taskforce's recommendations below.

Recommendation:

The Taskforce recommends a two-phased approach to move towards a single SRO.

1. Immediate Term

In the immediate term, a new single SRO that regulates both investment and mutual fund dealers should be created. This new single SRO would continue to conduct national market surveillance. It would reduce costs for dually regulated investment dealers and result in a streamlined approach to enforcement. An underlying principle of moving to the new SRO is that regulatory oversight must be commensurate with the market participant's size and sophistication. Once the SRO's registration capabilities are established to the OSC's satisfaction, it would carry out statutory registration functions on behalf of the OSC for investment dealers and mutual fund dealers, including registration of firms and individuals.

2. Longer Term

In the longer term, following the creation of the new single SRO (that oversees investment and mutual fund dealers), the OSC Board should formally determine whether additional firms directly regulated by the OSC, such as exempt market dealers, portfolio managers and scholarship plan dealers, which distribute securities or provide advice to clients, can be added to the oversight by the new SRO. Progress toward this goal should be assessed twice — first at the three-year mark — and a final

³⁸ Ontario Securities Commission. (2020, June 25). CSA consultation paper 25-402: Consultation on the self-regulatory organization framework. https://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20200625_25-402_consultation-self-regulatory-organization-framework.htm

assessment three years later. When assessing the feasibility, the OSC should consider the following principles:

- The implementation of a consolidated, single national SRO for capital markets that would replace IIROC and MFDA;
- The OSC's continued enforcement of a strong accountability and public policy alignment framework for the SRO (having been implemented as recommended in this report); and
- Regulatory oversight by the SRO that is fit for purpose and is commensurate with the market participant's size and sophistication.

Not all remaining categories of firms, such as exempt market dealers, portfolio managers and scholarship plan dealers, need to be transferred to the oversight of the new SRO at once. For the transfer of regulatory oversight, each category of firms must be assessed on their own merits. As a result, the transfer of oversight to the new SRO may be applicable for one or more categories and through staged phases.

The recommended two-phase approach minimizes disruption to SRO-regulated firms while remaining responsive to the need to streamline regulations for market participants. The newly created SRO would operate subject to an enhanced accountability framework.

3. Delegating More Registration Responsibilities to the new SRO in the Future

The Taskforce also recommends that, when certain conditions as set out below are met, the registration functions for firms overseen by the SRO be delegated by the OSC to the SRO, in addition to the registration functions for individuals of those firms. For greater certainty, the statutory authority for registration would remain with the OSC. Before delegating the registration of firms to the SRO, the OSC would verify that the following conditions have been met:

- The SRO staff must have the direct authority to grant, deny, suspend or put terms and conditions on registration and establish an "opportunity to be heard"-type process for review of decisions without IIROC's current District Council or Registration Sub-Committee's input.
- The OSC preserves its ability to impose terms and conditions on the registration or to suspend or terminate the registration of SRO dealer members.
- The new SRO improves its registration processing efficiency and cost-effectiveness, including by establishing registration-related service standards.
- Other requirements, as determined by the OSC, including requirements that the SRO has achieved enhanced accountability, transparency and regulatory enforcement.

10. Strengthen the SRO accountability framework through increased OSC oversight

Currently, the CSA conducts risk-based oversight of the two capital markets SROs, IIROC and MFDA. This oversight includes periodic oversight reviews, the review and approval of proposed rules, and regular reporting by SROs of activities and regular meetings with the SROs.

IIROC and MFDA have important public policy roles in Ontario's capital markets, yet stakeholders told us that these organizations do not have a well-defined accountability to, and alignment with, the Ontario Ministry of Finance and the OSC's public policy goals. In an already fragmented capital markets framework, this must change.

The two national SROs are integral to reducing fragmentation in Canadian capital markets regulation and are at the forefront of our fast-evolving markets. The important public interest mandate provided by the Minister of Finance to the OSC is carried out, in part, by the SROs. The successful fulfillment of this mandate requires the SROs to align with Ontario's vision to protect investors and facilitate growth in the capital markets.

To this end, the Taskforce recommends improvements to the SROs' recognition orders to enhance their governance and oversight. This recommendation supports the OSC's and the CSA's efforts in improving the existing SRO structure, as reflected in the 2020 CSA SRO Consultation.

The Taskforce recommends that the CSA adopts the Taskforce's recommendations below with respect to the appointment of SRO directors by the CSA.

Recommendation:

Giving the OSC greater tools to oversee both SROs and any SRO that may replace them in the future would allow the OSC to ensure accountability and public policy alignment. Stronger governance ensures that the appointment of the board of directors of SROs is independent of the management of the SROs. Ideally, this recommendation would apply to a consolidated capital markets SRO (See Recommendation 9 above). If however, within six months of the release of the report, significant progress has not been made on consolidation, the Taskforce recommends implementing this recommendation as it applies to the existing SROs.

1. Increased OSC Oversight of SROs

Prior to the consolidation of the two SROs (if significant progress has not been made on the consolidation within six months), the Taskforce recommends adding the following requirements to the OSC's recognition orders for MFDA and IIROC (this would apply to any SRO that may replace them in the future):

- Require the SROs to formally solicit the OSC and Principal Regulator's direction when developing their annual strategic and regulatory priorities, and to develop their annual business plan in alignment with the priorities that the OSC identified for the SROs.

- The OSC and other Principal Regulator (as defined under the current Memorandum of Understanding between the SRO and the securities regulators) be able to veto any significant publication, including guidance or rule interpretations.
- The OSC and other Principal Regulator (as defined under the current Memorandum of Understanding between the SRO and the securities regulators) be able to veto key appointments of the Chair and the first President and CEO, and term limits for those key appointments to be set by the OSC and other Principal Regulator.
 - The veto would allow the OSC to evaluate the Chair and CEO appointments to ensure that these key positions are being filled by individuals who can be counted upon to carry out their public interest responsibilities, including by meeting the required competence and capability requirements. Using the veto for these purposes would limit the risk of disagreements with other jurisdictions around the nature of those appointments.
 - The veto would not apply to subsequent President and CEOs.

2. Improving the Board of Directors of SROs

Furthermore, the SRO recognition orders should require that SROs (and any SRO that may replace them in the future) have some directors with investor protection experience. As well, the compensation and incentive structure applicable to SRO executives should be linked to the delivery of the public interest and policy mandate delegated to these bodies.

The OSC should continue to work with the other CSA regulators as part of the ongoing SRO review to change how directors are appointed for SROs. Up to half of the independent directors should be appointed jointly by all CSA regulators and a mechanism should be put in place to implement CSA director appointments, including a timely and effective process to resolve potential CSA disagreements on appointments.

The Taskforce recommends measures to instill confidence in the oversight and operations of both SROs (and any SRO that may replace them in the future) and continue ensuring the independence of their independent directors by also amending the OSC's recognition orders to require that:

- The definition of an SRO independent director mirrors that of a public company, including a cooling-off period of three years between working for, or being directly affiliated with, a member firm and becoming an independent director;
- The number of independent directors is higher than the number of directors from member firms; and
- The SRO Chair to be an independent director.

The Taskforce recommends the following for the board composition of the SRO, when there is a move to a single SRO in the future that would oversee investment dealers and mutual fund dealers and also conduct market surveillance:

- Not more than fifteen directors (including the CEO);
- A majority of independent directors (including at least four directors appointed by the CSA). Neither current nor former commissioners or employees of CSA regulators would be eligible for such appointments within a three-year cooling-off period;
- The CEO and Chair being independent directors; and
- Adequate representation of mutual fund dealer firms and of directors representing non-bank affiliated dealers.

If these oversight changes are implemented prior to consolidation, the following board composition for IIROC is recommended:

- Seven directors from industry member firms (five from investment dealers and two from marketplaces) including at least two directors representing non-bank affiliated dealers; and
- Eight independent directors, including the CEO (of which four would be appointed by the CSA). Neither current nor former commissioners or employees of CSA regulators would be eligible for such appointments within the three-year cooling-off period.

If these oversight changes are implemented prior to consolidation, the following board composition for the MFDA is recommended:

- Six directors from industry member firms including at least two directors representing non-bank affiliated dealers; and
- Seven independent directors, including the CEO (of which four would be appointed by the CSA). Neither current nor former commissioners or employees of CSA regulators would be eligible for such appointments within the three-year cooling off period.

The current requirements for independence are contained in the current recognition orders for SROs, which provide that at least 50 per cent of its board of directors (other than the President) are independent/public directors. The Taskforce recommends incorporating the meaning of “independent” in NI 52-110 into the new recognition order for MFDA and for IIROC with respect to their independent directors.

11. Remove the role of SRO district councils in making registration decisions and create an SRO escalation process to address complaints that SRO members may have about services received from their respective SROs in Ontario

Stakeholders have raised concerns with the Taskforce regarding the way that SROs carry out their registration and oversight roles, including complaints about regulatory burden on registrants. IIROC's current registration decision-making architecture defers key and extensive registration-related decisions to IIROC's District Councils (or their Registration Sub-Committees, as applicable). These District Councils are exclusively comprised of industry appointees (not permanent IIROC regulatory staff). Similar to IIROC, MFDA also has district councils; however, unlike IIROC, MFDA does not currently carry out registration functions on behalf of the CSA (including the OSC).

Recommendation:

The Taskforce recommends that all registration and similar gate-keeper functions of IIROC be carried out by IIROC regulatory staff exclusively, without any District Councils' involvement. The role of District Councils regarding registration matters should be advisory only. This recommendation also applies to any other SRO that may carry out registration functions on behalf of the OSC in the future.

Within twelve months, the OSC should create and oversee an escalation process to address any complaints that SRO member firms may have about services received from their respective SROs in Ontario. The escalation process should have protocols that ensure that it is not used as a source of appeal of regulatory decisions, as appeals would continue to fall within the exclusive jurisdiction of the OSC (or the Tribunal once established).

The OSC should develop the mandate and scope of the escalation process, ensure the binding effect of its decisions, and oversee the escalation process to ensure its organizational structure is commensurate with its use.

The OSC should determine whether the same escalation process would apply for both currently existing SROs (until such time as we move to a single SRO). The escalation process should be funded by the SROs and the SROs should be required to publish an annual report.

2.2 Regulation as a Competitive Advantage

The challenging economic conditions brought on by the COVID-19 pandemic have further highlighted the need to support the growth of Ontario’s issuers and intermediaries. The Taskforce heard from stakeholders that cost and access to capital are barriers for Ontario’s capital market participants. Changes are needed to facilitate capital formation for businesses, especially for smaller issuers. Market participants are in favour of reducing regulatory burden and streamlining regulatory requirements, without compromising investor protection.

Based on stakeholder feedback, the Taskforce included recommendations that: reduce and streamline regulatory requirements where appropriate; support a continuous disclosure model; and transition towards an “access equals delivery” model of information dissemination. To ensure that investors are being protected, the Taskforce is also recommending that the OSC be given additional tools to ensure that issuers are appropriately providing disclosure to the markets.

“We strongly support the Taskforce’s efforts to reduce the regulatory burden on capital markets participants... Regulatory requirements that are no longer necessary or no longer serve their intended purposes impose costs on firms and the economy in the form of reduced resources to allocate to growth opportunities, reduced competition and reduced efficiency. All of these costs are ultimately borne by investors.”

Investment Funds Institute of Canada

Our recommendations include measures to enhance our exempt market, allow for greater flexibility for public issuers, both large and small, and address specific policy issues such as short selling. Moreover, these reforms will incubate a thriving and diverse intermediary sector that better assists in capital formation, while reducing regulatory burden to save businesses time and money and enhancing investor protection. Collectively, these recommendations will improve capital access and increased liquidity in both public and private markets.

Supporting Ontario’s Issuers and Intermediary Market

12. Mandate that securities issued by a qualified reporting issuer using the accredited investor prospectus exemption should be subject to a reduced hold period of 30 days, and be eliminated within two years

Currently, securities issued by a reporting issuer under certain prospectus exemptions, such as the accredited investor (AI) exemption, are subject to a four-month restricted period before becoming freely tradable. This hold period timeframe was originally put in place to reflect the time required for the dissemination of news in a non-digital capital markets environment.

“We are supportive of the proposal to remove the four-month hold period... When securities are subject to a four-month hold period, the security is effectively illiquid for that period, which may limit how much of an issue can be purchased by institutional investors, and introduces administrative burden for institutional investors relating to tracking additional restricted securities of the same issuer.”

CFA Societies Canada

Through the Taskforce's consultations, multiple stakeholders have indicated that given the sophistication and knowledge of AIs, this four-month hold is an unnecessary regulatory burden that reduces liquidity for investors. Reducing this hold period would increase flexibility for the purchaser of the securities and reduce the administrative burden for all market participants involved, with a reduced need for tracking these securities. While this recommendation may create greater incentives for private placements rather than public prospectus offerings, many of the Taskforce's other recommendations would support ease of access to the public markets and enhanced continuous disclosure to the public.

The Taskforce notes that the CSA has an ongoing alternative offering model project that is considering allowing freely tradeable securities to be issued. We recommend that the CSA adopt this recommendation to further harmonize Canada's capital markets.

Recommendation:

Securities distributed under the AI prospectus exemption by all reporting issuers that have developed a continuous disclosure record of at least 12 months after filing and obtained a receipt for a prospectus or the filing of a filing statement in the case of a reverse-takeover transaction (RTO) or Capital Pool Company (CPC), should be subject to a reduced hold period of 30 days. Reporting issuers with a continuous disclosure record of less than 12 months or that have not filed a prospectus or filing statement would still be subject to a four-month hold period. Additionally, reporting issuers that file their disclosure on a semi-annual basis should be excluded from the reduced hold period.

After this change has been in effect for a period of two years, and its impacts reviewed by the OSC, the 30-day hold period should be eliminated.

The recommendation is limited to those issuers that have developed an adequate disclosure record after their initial prospectus disclosure for secondary investors to rely upon. The increased liquidity resulting from this recommendation would invigorate the secondary market and provide such issuers with additional capital-raising opportunities.

No change is being proposed to the dealer and underwriter registration requirements or related compliance obligations. Reducing, rather than eliminating, the hold period would help to prevent indirect underwritings to investors who are not accredited. The issuer and any dealer involved in the distribution would still be required to take reasonable steps to ensure that the initial purchaser is properly relying on the AI exemption and is purchasing as a principal and not with a view to further distribution. Such reasonable steps could include representations and warranties in the purchasers' subscription agreements that they are purchasing the securities with investment intent and not with a view to distribution, provided that such representations and warranties are reasonable in the circumstances. The OSC should develop guidelines regarding these reasonable steps to provide greater clarity to market participants.

This recommendation, together with others in this report, represents a shift towards greater reliance on continuous disclosure and greater capital-raising options that do not involve a prospectus. The OSC should continue to prioritize continuous disclosure in its compliance review; new tools for this purpose are described in Recommendation 13 below.

13. Provide OSC with additional tools for continuous disclosure and exemption compliance

Continuous disclosure by reporting issuers is fundamental to the efficient operation of the capital markets. Modernizing the securities regulatory regime involves an increased emphasis on continuous disclosure over prospectus disclosure. This trend is increasing as alternative forms of financings in the exempt market are adopted and the number of traditional prospectus offerings declines. However, many of the OSC's compliance tools are focused on the review and receipt of a prospectus. As continuous disclosure becomes more important, it will continue to be an increasing focus of the OSC's compliance efforts. New compliance tools will enable the OSC to resolve compliance issues quickly and effectively.

Similarly, as prospectus exempt offerings become an increasingly significant part of the Canadian markets, including potential expanded exemptions proposed in this report, compliance with the terms of those exemptions becomes much more important.

These tools would not be appropriate for serious breaches of securities law, which should be addressed through enforcement processes. However, they would facilitate improved issuer disclosure and exemption compliance that would benefit markets and enhance investor protection.

Recommendation:

To enhance the OSC's compliance efforts related to issuer disclosure and exemption compliance, the OSC's Director of Corporate Finance should have the ability to impose terms and conditions on issuers in connection with compliance reviews. The scope of the terms and conditions should be flexible so that they may be tailored to circumstances but should specifically include orders related to the cease trading of distributions or the continued trading of securities and the ability of an issuer to rely on prospectus exemptions.

In order to ensure fairness for issuers, there should be an opportunity to be heard before the Director makes a decision and an appeal to the Tribunal.

14. Streamline the timing of disclosure (e.g., semi-annual reporting)

Publicly listed companies in Ontario are currently required to provide quarterly financial reporting of interim financial results and accompanying Management Discussion and Analysis (MD&A).

However, issuers incur significant costs and allocate substantial resources to producing quarterly financial statements and MD&A. While quarterly financial statements provide timely information to investors and intermediaries, there can be instances in which the regulatory and internal cost of preparing such frequent reporting exceeds the benefit. This is particularly true for smaller issuers and issuers that are developing towards generating revenue that may not experience significant changes to their operations that would be reflected in the financial statements.

Through its public consultations, stakeholders agree that smaller issuers face a disproportionate burden through ongoing quarterly reporting requirements but have raised concerns over eliminating quarterly reporting due to the reduction in timeliness of disclosed information to investors and the market. Stakeholders also expressed concern about Ontario's disclosure requirements not being aligned with other Canadian jurisdictions and the U.S.

Recommendation:

To minimize regulatory burden, the Taskforce is recommending changing the requirement for quarterly financial statements to allow for an option for publicly listed reporting issuers to file semi-annual reporting. Reporting issuers would be eligible for this option if the issuer:

- has developed a continuous disclosure record of at least 12 months after filing and obtaining a receipt for a final prospectus or filing a filing statement in the case of an RTO or CPC;
- has annual revenue of less than \$10 million, as shown on the audited annual financial statements most recently filed by the reporting issuer; and
- is not currently, and has not recently been, in default of their continuous disclosure obligations.

If an issuer that has adopted semi-annual filing achieves revenue of \$10 million or greater, it would be required to resume quarterly filing following the filing of its audited annual financial statements.

Once the impact of the semi-annual filing by the eligible issuers that take advantage of this option has been assessed over a period of two years, the OSC should consider whether the range of issuers that may file on this basis should be expanded.

In addition, the decision to file on a semi-annual basis must be approved by holders of a majority of shares entitled to vote, excluding any related parties of the issuer, prior to adopting this option and reconfirmed at least every three years.

Issuers that adopt semi-annual filing would not be eligible to take advantage of the exemption proposed in the recommendation related to an alternative offering model, which would allow issuers to distribute freely tradeable securities primarily based on their continuous disclosure record. In addition, since semi-annual filing would increase the importance of material change reporting,

the OSC should continue to prioritize continuous disclosure in its compliance review; new tools for this purpose are described in a different Recommendation.

Given the need for a harmonized approach, the OSC should implement this recommendation in consultation with the CSA, to ensure harmonization across Canadian jurisdictions.

15. Create a dealer registration “safe harbour” for issuers and their Associated Persons

Under the current securities regime, if an issuer distributes its own securities with regularity and without the involvement of a registered dealer, the issuer and/or officers, directors, employees or agents of the issuer (collectively, “Associated Persons”), in some circumstances, may be considered in the business of trading securities. This then trips the business trigger and requires registration. There is currently some uncertainty among market participants as to when an issuer or its Associated Persons may be considered in the business of trading securities.

Recommendation:

The Taskforce recommends creating a dealer registration “safe harbour” exemption for issuers and their Associated Persons through an OSC blanket order or rule change that would allow an issuer to engage in certain passive “permitted investor relations activities” (PIRA) without requiring registration. Passive activities may include:

- Preparing offering documents and subscription agreements;
- Passively offering shares of the issuer to investors through the issuer’s website; and
- Passively accepting subscription requests that have not been solicited by the issuer or Associated Persons.

The OSC should also be designated the authority to publish guidance on the comprehensive list of what constitutes PIRA.

This recommendation would improve the capital-raising process. Issuers could conduct some capital-raising activities with regularity and without needing to employ the services of a registered dealer. This would particularly help smaller issuers that find it difficult to access capital.

This recommendation intends to reduce regulatory uncertainty by providing a clearer test of which activities may be conducted by an issuer and its Associated Persons without being registered. The OSC’s ability to take compliance and enforcement action against bad actors would be strengthened, as boiler rooms and issuers that engage in active selling activities should be registered, resulting in enhanced investor protection.

16. Introduce an alternative offering model for reporting issuers

The existing prospectus system functions well for larger issuers that can absorb the costs of conducting a public offering. However, the high costs associated with preparing and filing a prospectus can prove to be a barrier to capital-raising for smaller issuers. Placing greater reliance on a reporting issuer's continuous disclosure record to support investment decisions rather than the filing of a prospectus for ordinary course financings would provide capital at a lower cost to these companies.

Through its public consultations, the Taskforce heard from issuers and investors that there is a need to provide more efficient access to the capital markets for public issuers, while balancing the need to ensure that investors receive sufficient information to inform their investment decisions. Reporting issuers with an established continuous disclosure record can benefit from access to capital at a lower cost through reduced offering requirements, without diminishing investor protection.

Recommendation:

The Taskforce recommends introducing an alternative offering model prospectus exemption for all reporting issuers, with securities listed on an exchange that are in full compliance with their continuous disclosure requirements to allow them to offer freely tradeable securities to the public.

The exemption would include conditions such as:

- The issuer must have been a reporting issuer for 12 months; and must be up to date with its continuous disclosure and not be in default; securities offered under this prospectus exemption must be of a class that is listed on an exchange;
- The offering must be subject to an annual maximum; and
- Issuers must file a short disclosure document with the appropriate regulator to update the continuous disclosure record for recent events (including information regarding the use of proceeds) and certify its accuracy. Both the disclosure document and certificate would be required to be filed on the System for Electronic Document Analysis and Retrieval (SEDAR) or an updated system.

This exemption allows issuers to raise capital based on their continuous disclosure record and a short offering document, rather than a prospectus filing. Investors would assume the same level of risk as purchases of the same securities in the secondary market.

The annual maximum for offerings under this exemption should be set at 10 per cent of market capitalization as of the beginning of a set annual period. For smaller issuers with a market capitalization under \$50 million, the annual maximum should be the lesser of \$5 million or 100 per cent of the issuer's market capitalization, which caps the amount these issuers can offer under these reduced reporting requirements. This annual maximum is recommended to reflect the issuer's increased reliance on continuous disclosure and limited civil and statutory protections while ensuring appropriate investor protection. Offerings beyond such limits would continue to require a prospectus filing.

The remedies for investor losses in secondary market trading for misrepresentations in its continuous disclosure record are much more limited than the remedies for a misrepresentation in a prospectus. Since the proposed alternative offering exemption is a primary offering by the issuer and the issuer would receive the proceeds of the offering, an investor should have the right to an effective remedy against the issuer if the offering document contains a misrepresentation. The Taskforce recommends that offerings under this exemption be designated as having the same liability as under a prospectus offering. Imposing the same level of liability would provide incentives for the issuer to take steps to avoid misrepresentations.

The Taskforce notes that the CSA's ongoing alternative offering model project is considering several proposals regarding different offering models for issuers and recommends that the CSA adopt this recommendation to further harmonization across Canada's capital markets.

17. Develop a well-known seasoned issuer model

In the U.S., a well-known seasoned issuer (WKSI) allows certain issuers to be subject to a less burdensome shelf registration process. WKSI issuers must be above a certain public float or have issued debt securities above a set amount in a specified time period and have established an appropriate disclosure record. WSIs can register their securities offerings on shelf registration statements that become effective automatically upon filing.

Stakeholders were very supportive of introducing this regulatory model in Canada. The new model reduces the regulatory burden on large issuers that meet prescribed thresholds, making it more cost-efficient and attractive for such issuers to raise capital in Ontario's capital markets.

The Taskforce notes that the CSA's ongoing alternative offering model project is considering the WKSI model and recommends that the CSA adopt this recommendation to further harmonization across Canada's capital markets.

Recommendation:

It is recommended that the OSC develop a WKSI model in Ontario to issue shelf prospectus receipts automatically for issuers that are above a certain public float or have issued debt securities above a set amount in a specified time period and have established an appropriate disclosure record. The Taskforce recommends that the appropriate threshold for an issuer to qualify for the WKSI classification is a public float of a minimum of \$500 million. This threshold is reflective of the size of Ontario's capital markets and will apply to issuers that are already well-known and followed by market analysts.

The WKSI model would not result in a change to the current approval requirements for novel derivatives offered under a shelf prospectus supplement, such as linked notes or similar investment products.

The OSC, together with the CSA, should also consider implementing additional changes to the shelf prospectus system to provide similar accommodations to those available to WKSIs in the U.S., which would assist in capital formation.

This would streamline the shelf prospectus process for such large issuers that meet the prescribed thresholds and make it more cost-efficient for such issuers to raise capital in Ontario's capital markets.

18. Introduce a finder category of registration and provide the OSC with rulemaking and designation authority to modernize and provide greater certainty regarding application of “promoter” status

Issuers regularly use finders to conduct non-brokered private placements. The prominent use of finders suggests that certain types of issuers, primarily smaller issuers such as start-ups, small businesses, and venture issuers, may be experiencing difficulties in accessing capital through EMDs and investment dealers.

Under the current regulatory framework, acting as a professional finder is generally considered to be a registerable activity since it involves trading in securities with regularity for a business purpose (i.e., the business trigger for registration). However, requiring individual finders to register as an EMD may not be well-tailored and may be too onerous for individual finders.

Furthermore, the definition of a “promoter” in the *Securities Act* is outdated. In addition, there is no specific recognition that a person's status, in terms of whether they are a promoter, may change over time. Interpretative issues with the current definition frequently arise in prospectus reviews and are a source of uncertainty for market participants.

Recommendation:

The Taskforce recommends introducing a finder registration category, that would be less burdensome than the current registration regime for EMDs and updating the promoter definition.

1. New Finder Registration Category

The finder registration category would:

- Impose fewer obligations compared to those imposed on EMDs or investment dealers (such as lower capital requirements), while maintaining the integrity and proficiency standards that are the cornerstones of investor protection;
- Permit finders to engage in solicitation and client-facing conduct and receive transaction-based compensation, while ensuring that sales of securities would be executed through a registered dealer; and
- Eliminate the need for a finder to have an ultimate designated person or chief compliance officer since finders would, in substance, perform these functions themselves.

Finders would have to comply with conflicts of interest and compensation disclosure requirements to maintain fair and efficient capital markets. However, other EMD requirements would be modified such as:

- Reduced minimum capital;
- Reduced insurance since the finder should be precluded from having access to or custody of client assets; and
- Reduced client relationship disclosure.

A proportionate registration regime for finders would help protect investors by encouraging the use of registered finders (who meet integrity and proficiency standards and have been found to be fit for registration) over unregistered finders (some of whom may raise integrity and proficiency concerns and may be acting unlawfully). As finders are merely involved in the introduction of investors to issuers, this recommendation may stimulate growth in the intermediary market because issuers would still be required to utilize EMDs or investment dealers in connection with the ultimate sale of securities.

2. Updating the Definition of Promoter

The Taskforce recommends a legislative amendment to enable the OSC to designate and make rules regarding promoter status, including:

- Defining whether a person or class of persons is or is not a promoter;
- Prescribing circumstances in which status as a promoter ends; and
- Varying the definition of promoter in specified circumstances to address different organizational structures.

19. 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

Stakeholders have noted that publicly listed companies increasingly rely on financing through private placements rather than prospectus offerings. One reason for this trend is the limited ability to “test the waters” prior to a prospectus offering. Although the bought deal exemption provides for the ability to solicit expressions of interest prior to the filing of a preliminary prospectus, it requires the underwriters to take on the risks of the offering. The risk of a failed transaction leads to less use of the short form prospectus structure, apart from the most senior issuers.

In 2019, the U.S. Securities and Exchange Commission enabled all issuers to engage in test-the-waters communications with qualified institutional buyers and institutional accredited investors regarding a contemplated and registered securities offering prior to, or following, the filing of a registration statement related to such offering.

Many stakeholders who provided feedback on the Taskforce's Consultation Report support rule changes to the pre-marketing prohibitions that would align regulation in Ontario with recent rule changes in the U.S. Further, stakeholders advised that appropriate monitoring of the trading patterns of market participants who have access to confidential advance information is important to detect and deter insider trading or tipping.

“Issuers should have the ability to “test the waters” with institutional investors ahead of filing a preliminary prospectus... It would be useful for institutional investors to communicate interest in potential offerings to issuers and their advisors if such communication results in the availability of more offerings in which to invest.”

OMERS

Recommendation:

The Taskforce recommends liberalizing the ability for reporting issuers to pre-market transactions to institutional accredited investors prior to the filing of a preliminary prospectus. The ability to communicate with potential investors to gauge the demand for a public offering would minimize the risk of failed transactions. This recommendation should be implemented by making changes to the existing pre-marketing prohibition, instead of creating a new exemption.

A more restrictive testing-the-waters regime in Ontario relative to the U.S. puts Ontario issuers and investors at a disadvantage. Accordingly, the Taskforce recommends allowing pre-marketing of transactions to proceed on a similar basis as under the U.S. regulatory regime while taking into consideration the liquidity of the Canadian market.

The greater flexibility for reporting issuers to pre-market transactions to institutional accredited investors prior to the filing of a preliminary prospectus should be accompanied by increased monitoring and compliance examinations. Regulators should review the trading patterns of any such institutional accredited investors to deter insider trading and tipping. To assist with this, investment dealers should be required to keep a list of contacted investors in their deal file and that it be filed with IIROC in an IIROC prescribed format or provide the OSC with such a list upon request. The filing would allow IIROC to monitor such activities without creating additional regulatory burden, such as non-disclosure agreements being signed by institutional accredited investors. It is expected that premarketing done in relation to private placements of reporting issuers be filed with IIROC in the same format.

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

As technology advances and digital access increases, the methods companies use to communicate with their investors and stakeholders will also evolve. Allowing companies to provide documents in electronic format, including by posting them on websites, helps to minimize the resources (both time and costs) when compared to physical delivery. The ongoing COVID-19 pandemic underscores the need for Ontario's market participants to be able to adapt to a digital-first world.

Many stakeholders commented on the timeliness of electronic delivery and expressed a general preference for less paper-based communication. They also indicated to the Taskforce that reducing the costs of communication by adopting digital delivery is beneficial to all market participants. Digital delivery is operationally simpler for issuers and fund manufacturers and allows investors electronic seamless access to investment documents, which is even more important during the COVID-19 pandemic. As well, facilitating more digital delivery improves environmental sustainability.

Recommendation:

The Taskforce recommends adopting full use of electronic or digital delivery in relation to documents mandated under securities law requirements (i.e., access equals delivery model) and reducing duplicative and unnecessary regulatory burden.

An access equals delivery model should replace the defaulted delivery of disclosure documents of all issuers and investment funds, including: a prospectus under prospectus offerings, annual and interim financial statements and related Management Discussion and Analysis (MD&A), and the management report of fund performance (MRFP). For greater certainty, notification that these disclosure documents are available would not be required, and as long as they are accessible on the internet, investors are considered to have received delivery of these documents.

The Taskforce also recommends an electronic delivery model for all other documents that investors receive, including electronic delivery of materials that they rely on in order to vote, such as proxy-related materials and notices for regular and special meetings. The Taskforce recognizes that this would need to be implemented with a requirement for all investors to provide email contact information and, in the interim, it would apply only to investors who receive actual notice by email. This would help ensure investors have appropriate advance notice regarding the availability of pertinent investment information. Issuers could consider extenuating circumstances on a case-by-case basis for the provision of mailed documents.

The Taskforce recommends that the access equals delivery model be implemented in Ontario within six months following the publication of this report. The Taskforce recognizes that this recommendation would likely be most effective when implemented in a harmonized manner across the country and urges the other members of the CSA to consider also adopting a similar model to reduce the regulatory burden on issuers across Canada.

21. Consolidate reporting and regulatory requirements

As our capital markets regulatory framework modernizes, outdated and duplicative public reporting requirements must also be addressed. Unnecessary costs and resources are borne by companies and shareholders when reporting requirements are not streamlined. Further, duplicative information repeated in multiple disclosure documents adds to the volume and complexity of disclosure that investors must absorb.

Stakeholders are generally supportive of consolidating reporting and regulatory requirements to reduce regulatory burden. The Taskforce heard that issuers would welcome any reduction in costs associated with streamlined reporting and regulatory requirements. Moreover, stakeholders advised that consolidating and clarifying certain disclosures and promoting accessibility may enhance investor protection by improving the quality of disclosure.

Recommendation:

The Taskforce is recommending that in 2021, the following reporting and regulatory requirements be enacted:

1. Combining form requirements

Combining the form requirements for the Annual Information Form (AIF), MD&A, and financial statements. Reporting issuers can still opt to keep their financial statements separate, but they would benefit from having the option of combining them with the AIF and MD&A similar to the approach taken in the U.S., where they can file the equivalent to the AIF, MD&A and financial statements as one package. This would result in less duplication between the MD&A and AIF language, particularly around the description of the business and risk factors.

2. Streamlining the material change report

Streamlining the material change report by allowing instead, at the election of the market participant, the filing of a news release containing the required information about a material change on SEDAR. This would be consistent with existing practices where the material change report wraps the news release that has already been filed on SEDAR.

3. Eliminating the MRFP

Eliminating the interim MRFP, streamlining the contents of the MRFP, and in accordance with the move to access equals delivery recommended above in Recommendation 20, eliminating physical delivery of the MRFP to investors. The Taskforce notes that these changes are overdue as the MRFP was not streamlined when the Fund Facts disclosure requirement was implemented.

4. Investment fund issuers

Streamlining certain reporting and regulatory requirements applicable to investment fund issuers.

5. Prospectus and Annual Information Form

Combine the simplified prospectus and annual information form into one annual disclosure document, eliminating redundant disclosure requirements and updating other requirements.

6. Other changes to financial report requirements

Make changes to financial reporting requirements to eliminate the requirement to include unnecessary non-IFRS items from the financial statements.

7. Personal Information Form

Streamline the Personal Information Form (PIF) filing requirements for all issuers.

Following the publication of the Consultation Report, the OSC published in August 2020 a final version of rule amendments to reduce the number of Business Acquisition Reports (BAR). As such, the Taskforce's view is that further changes to BAR reporting are not warranted at this time. The Taskforce recommends that the OSC reassess periodically whether additional changes are needed to BAR reporting after the current amendments take effect in November 2020.

This recommendation should be implemented in Ontario. However, we recognize that this recommendation would also likely be most effective when implemented in a harmonized manner across the country and urges the CSA to consider adopting a similar model in order to reduce the regulatory burden on issuers across Canada.

22. **Allow exempt market dealers (EMDs) to participate as selling group members in prospectus offerings and be sponsors of reverse-takeover transactions**

EMDs have traditionally played an important role in assisting smaller issuers and start-ups to raise capital at the pre-IPO stage. However, as smaller issuers grow and seek financing through prospectus offerings, EMDs are often unable to continue supporting these issuers. EMDs are currently prohibited from participating as selling group members in prospectus offerings even though this was previously allowed prior to December 2017. Allowing EMDs to again participate would enable them to maintain their relationships with issuers following an IPO and would open additional channels of financing to issuers, particularly venture issuers. In addition, the current restriction on EMDs participating in prospectus offerings is a barrier to EMDs acting as agents in CPC offerings (used by smaller issuers under the TSXV's capital-raising framework because the TSXV's CPC Policy requires at least one agent in the CPC offering to be an IIROC member).

The Taskforce’s consultation has indicated that stakeholders are supportive of the underlying policy objective of enhancing capital raising opportunities for issuers by allowing EMDs to act as selling group members in prospectus offerings and as sponsors of RTOs. This would also provide investors with access to greater investment opportunities and help companies grow with the additional capital raised.

Recommendation:

The Taskforce recommends that the OSC and TMX allow EMDs to act as “selling group members” in the distribution of securities made under a prospectus offering. The recommendation would include initial public offerings and prospectus offerings in connection with a qualifying transaction.

The OSC should set reasonable conditions on EMDs to be eligible to act as “selling group members” in prospectus offerings, such as the following:

- An investment dealer acts as an underwriter in connection with the distribution and signs an underwriter certificate in accordance with the requirements of Ontario securities law; and
- The commissions, fees or other compensation paid to the EMD do not exceed 50 per cent of the commissions, fees or other compensation paid to the investment dealer that acts as underwriter.

The above conditions are intended to ensure that investment dealers remain involved in the offering and will be signing an underwriter certificate.

The Taskforce also recommends that the OSC work with stock exchanges to allow EMDs to act as sponsors in RTOs.

This recommendation would improve capital-raising, particularly for smaller issuers that currently find it difficult to access capital through investment dealer channels. Investors may also experience more opportunities to participate in prospectus offerings through established EMD distribution channels. This recommendation recognizes the important role EMDs play in supporting early-stage issuers and allows these players to participate in an issuer’s entire lifecycle (i.e., from early to growth/maturity stage).

The Taskforce recognizes that this recommendation will be most effective when implemented in a harmonized manner across the country and urges the CSA to consider adopting a similar model in order to reduce the regulatory burden on issuers across Canada.

23. Introduce additional Accredited Investor (AI) categories

In 2019, 90.5 per cent of capital raised under prospectus exemptions was raised using the AI exemption.³⁹ The current definition of AI includes individuals who meet specific income and net financial asset thresholds. Although these criteria may be indicative of an investor's ability to withstand potential market losses, they are not necessarily correlated with one's sophistication or ability to understand risks associated with investments, including the potential for losses. In August 2020, the U.S. Securities and Exchange Commission updated the definition of AI under its rules. The expansion of new categories to the definition included, but was not limited to, professional knowledge, experience or certifications (in particular, those with Series 7, 65, or 82 licenses), "knowledgeable employees" (such as executive officers and directors) of a private fund, and "family offices" with at least US\$5 million in assets.

Through the Taskforce's public consultations, many stakeholders were supportive of expanding the AI categories. Stakeholders have noted the importance of capital formation for businesses and the greater access to investments, while maintaining appropriate investor protection. Stakeholders also noted that the AI should be expanded to encompass investors who have the proficiency to understand the potential risks of investments.

Recommendation:

The Taskforce recommends expanding the AI definition to those individuals who have completed and passed relevant proficiency requirements, such as the Canadian Securities Course Exam (in conjunction with another proficiency exam); the Exempt Market Products Exam; the CFA Charter; or those who have passed the Series 7 Exam and the New Entrants Course Exam (as defined in NI 31-103) indicating a high degree of understanding of investments and markets.

If an individual meets the requisite proficiency standard in order to be able to recommend investment products to other investors, that individual should be capable of making similar investment decisions for themselves. Adding criteria based on existing educational proficiency requirements would provide greater investment opportunities for individuals who already have the sophistication required for investment decisions and can adequately quantify and understand the risk of potential investments.

This recommendation addresses the growing importance of the exempt market and the need to increase capital raising options undertaken by issuers. Expanding the definition of AI would lead to increased opportunities for individual sophisticated investors who understand investment risks, as well as greater availability of private capital for issuers.

The OSC should publish guidance to create transparency such that the new categories are easily understood by investors and can be verified by businesses.

³⁹ Ontario Securities Commission. (2020). Ontario's exempt market.

24. Expedite the SEDAR+ project

Currently, market participants must navigate six separate technology platforms to file or search various electronic regulatory documentation.

SEDAR+, formerly known as the National Systems Renewal Program, is an initiative of the CSA that aims to replace CSA national systems — the System for Electronic Document Analysis and Retrieval (SEDAR), the System for Electronic Disclosure by Insiders (SEDI), the National Registration Database (NRD), the National Registration System, the National Cease Trade Order Database (CTO) and the Disciplined List (DL)) with a more centralized CSA IT system. CSA members have been working together on the SEDAR+ project since 2016. The SEDAR+ project aims to:

- Allow for single portal access to all filings;
- Address cyber security and privacy management;
- Allow for a larger scope of filings and system users;
- Provide better functionality through a modernized user interface, with search function improvements and harmonized processes for all filings; and
- Facilitate better data quality through database consolidation and input standardization.

The target date for Phase I (replacement of SEDAR, CTO and DL) is currently expected to launch in 2021. Phase II will target the replacement of SEDI and NRD.

Through the Taskforce's public consultations, all commenters voiced concerns over the antiquated systems and universally supported expediting the SEDAR+ project given the benefits. Market participants continue to rely on accurate digital information for regulatory disclosures and filings to evaluate issuers and support their investment decisions. Updating the program would help investors and businesses save time and money.

Recommendation:

The Taskforce supports the goal of the SEDAR+ project and recommends that the OSC work with all CSA jurisdictions and accelerate this initiative. SEDAR+ would modernize how market participants use the centralized system, making it easier to file and access documentation. Given the importance and impact SEDAR+ would have on market participants and their operations, the Taskforce recognizes the need to expedite this project.

Through the consultations, stakeholders called for a centralized system that is user-friendly for all levels of investor sophistication and searchable to expedite access to information. Aside from existing input from market participants on SEDAR+, the Taskforce also recommends that the centralized system be tested with stakeholders prior to launch, such that feedback on the features and functionality can be incorporated and potential risks can be mitigated.

Expediting the SEDAR+ project would facilitate the implementation of the Taskforce's recommendation of the access equals delivery model. Furthermore, the Ontario government has recently placed a greater emphasis on the digitization of the services it provides, and the Taskforce recommends expediting the SEDAR+ initiative as a means of achieving this policy goal.

25. Modernize Ontario's short selling regulatory regime

Short selling is an essential part of capital markets activities which provides liquidity and facilitates efficient price discovery. Traditionally, Canadian securities regulators have relied on anti-manipulation and deceptive trading prohibitions to manage the potential adverse impact of short selling on the market. Currently, a market participant in Ontario wishing to engage in short selling must have a reasonable expectation of settling any trade that would result from the execution of a short sale order.

The current requirements under IIROC's Universal Market Integrity Rules (UMIR) are not stringent enough to ensure that short sellers are taking appropriate steps to confirm that adequate securities are available to them to settle any short sale execution prior to the entry of the order in the marketplace. Ontario's short selling regime stands in contrast to both the U.S. and the European Union, where there are pre-borrow or locate requirements for short sales as well as mandatory close-out or buy-in provisions.⁴⁰ In addition, concerns about "short and distort" campaigns exist and are addressed in the recommendation that outlines a prohibition to deter and prosecute such misleading or untrue statements.

Recommendation:

The Taskforce recommends that IIROC revise its UMIR to require an investment dealer to confirm the ability to borrow securities prior to accepting a short sale order from another person or entering an order for its own account. Securities that are identified as "easy-to-borrow" would not be subject to this requirement.

1. Types of Confirmation

Types of confirmation include:

- Confirmation that the security has been borrowed;
- Confirmation that a bona-fide arrangement has been made to borrow the security; or
- Confirmation that there are reasonable grounds to believe that the security can be borrowed (identified as "easy to borrow"), so that it can be delivered on the settlement date.

⁴⁰ McMillan LLP. (2019, November). Short Selling in Canada: Regulations are weak and a new path forward is needed to reduce systemic risk. https://www.mcmillan.ca/Files/220217_Short_Selling_in_Canada.pdf

2. Mandatory Buy-In

Should a short sale fail to settle, the short seller would be subject to a mandatory buy-in. To allow for fails due to administrative issues, the buy-in requirement would be triggered at settlement date +2 (trading date +4). The obligation to execute the buy-in would rest with the dealer. This would accommodate administrative delays, such as legend removal or delayed corporate actions.

When implementing the rule, IIROC should consider if any additional activities may cause a legitimate settlement delay, thereby warranting a specific exemption from the buy-in requirement. IIROC should inform the OSC if changes to the rules of the Canadian Depository for Securities Ltd. are also required.

When the buy-in requirement is triggered, IIROC should allow the dealer to buy-in at reasonable commercial terms, determined by prevailing market conditions, which include several factors, such as price and liquidity, by a specified date. This would aim to prevent introducing risks to fair and orderly markets.

This recommendation would align Ontario's short selling regulation with the positive locate model in the U.S. In the interest of harmonization, the Taskforce strongly recommends that the CSA consider implementing these changes to the short selling regime across Canada.

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

The existing prospectus system is generally working effectively for Canadian issuers. However, multiple stakeholders advised that short selling in connection with prospectus offerings and private placements is making pricing and execution of prospectus offerings more difficult. Since prospectus offerings and private placements are generally priced at a discount to the market price, market participants and investors who expect to purchase under the offering may seek to profit through aggressive short selling prior to the offering to depress the price of the offering.

Short selling is particularly problematic where the underwriters are engaged in market stabilization in connection with the prospectus offering. In the U.S., the Securities and Exchange Commission has addressed some of these concerns through the prohibition in Rule 105 of Regulation M: Short Selling in Connection with a Public Offering. Stakeholders noted to the Taskforce that bought deals pre-arranged with hedge funds who are shorting the stock before the bought deal is announced are rife in the Canadian markets, particularly within capital-intensive industries. This harms the company, its shareholders and the uninformed investors trading against the short sellers.

Recommendation:

The Taskforce recommends that the OSC adopt a rule prohibiting market participants and investors who have previously sold short securities of the same type as offered under a prospectus or private placement, from acquiring securities under the prospectus or private placements.

There are current requirements that could potentially apply to short selling in advance of a prospectus offering or private placements, such as:

- Market participants and investors who have access to material undisclosed information concerning the offering would be precluded from short selling by the insider trading prohibition;
- The underwriter registration requirement may apply to market participants and investors who sell short in advance of an offering and fill their short position through the offering, since this is a form of indirect distribution;
- Insiders of the issuer who enter into securities lending arrangements in connection with short sales prior to an offering would be subject to reporting requirements; such transactions may also be limited by the insider trading prohibition and applicable blackout periods; and
- The prohibition on market manipulation may apply to conduct that artificially depresses the price of the securities.

These requirements, however, would require detailed and contextual analysis.

A simple requirement that does not require regulators to prove intent is preferable. This would prohibit market participants and investors who have a short position arising from a short sale in a security of the same type as offered under a prospectus or through a private placement (or fungible with such securities, such as a warrant, option or convertible or exchangeable security) from acquiring securities in an offering. It would create greater clarity for all market participants and be less complicated from both a conduct and compliance perspective. This recommendation should not apply to trading in exchange-traded funds. Exemptions for activities such as market-making by registered dealers should be considered.

27. Amendments to IIROC’s UMIR 6.4 to harmonize with Regulation M for large block trades

In the absence of any exemptive relief, UMIR requires trades to be executed on a marketplace as it relates to cross-border “large in magnitude” bought deals. While IIROC would typically provide an exemption to allow the “take-on” portion of the trade to be executed off-marketplace, it would generally require the unwinding trade (i.e., the trade to be distributed to clients) to be executed on a marketplace, and that better-priced orders are displaced. In the U.S., qualifying bought deals rely on Regulation M (Reg M) exemptions which allow the entire transaction, including the distribution to clients, to be completed away from the market.

The difference in requirements places Canadian dealers at a competitive disadvantage to be able to compete fairly for these deals. There is less complexity under the U.S. requirements in comparison to Canada where “on-market” execution is generally required. This added complexity is seen to reduce the opportunity for Canadian dealers to participate in large cross-border deals. The opportunities are generally only provided to U.S. dealers who can complete the transactions under Reg M with reduced complexity. Further concern rests with the inability of Canadian dealers to participate in these deals, thereby restricting access by Canadian clients, including retail clients. While in some situations, exemptive relief may be available to Canadian dealers, there is some degree of uncertainty about how the exemptive relief process would apply in an efficient and timely manner to these transactions.

Recommendation:

To address these concerns, the Taskforce recommends that IIROC propose rule amendments to UMIR 6.4 that specifically exempt these cross-border bought deal transactions from the requirement to execute on a marketplace. These exemptions should at a minimum be extended to:

- Securities that are listed both in Canada and the U.S.
- Transactions that are “large in magnitude”, that are:
 - Greater than 5 per cent of the public float; and
 - For a value greater than \$500 million
- Would qualify as a distribution subject to Reg M and qualify for the block exemption afforded by Reg M under U.S. securities law.

The exemption would require that there is appropriate public transparency, such as a press release. During analysis and implementation, IIROC should consider an exemption for similar-size transactions on Canadian marketplaces, given the smaller market cap, a minimum value threshold should be considered.

The Taskforce recommends that OSC and IIROC, at a later date, assess and consider whether further harmonization with Reg M should be implemented in order to keep Ontario markets competitive.

28. Improve the ability of independent dealers to access capital through sub-debt, new issue letters, rules around capital requirements for bought deals

Current IIROC prudential requirements relating to investment dealers are intended to set and enforce high-quality regulatory standards, protect investors and strengthen market integrity. However, certain requirements may inadvertently and unnecessarily limit access to or restrict critical sources of liquidity and capital by dealers. The Taskforce heard that increased collateral requirements imposed by clearing agencies in accordance with their risk management frameworks in certain circumstances might restrict critical sources of liquidity for independent dealers. Assisting independent dealers in their role of facilitating capital raising for entrepreneurs and businesses is imperative not only from a public policy perspective, but also to foster economic growth.

Subordinated debt

A subordinated loan is an unsecured debt instrument that is designed to be an efficient vehicle for IIROC dealers to manage liquidity needs and support regulatory capital. IIROC rules require a three-party uniform agreement between a dealer, its creditor and IIROC; and repayment requires IIROC approval. However, the standard agreement also prioritizes claims by chartered Canadian banks as senior to all other creditors, with the exception of customer claims. Stakeholders advised that prioritizing banks over other lenders could be needlessly restricting the pool of available creditors, and thus, dealer access to available sources of liquidity and capital.

Underwriting commitments

One way to obtain IIROC reduced margin requirements for an underwriting commitment is if a dealer obtains a new issue letter with minimum terms acceptable to IIROC. A new issue letter can also be an efficient means of providing a dealer with access to an appropriate underwriting loan facility that can be drawn upon as needed. However, if the new issue letter issuer is an Acceptable Institution as defined by IIROC, we have heard that accessing new issue letters from such entities by independent dealers is onerous at best, or not likely at all. As a result, those dealers would have to seek a new issue letter from a lender that does not meet the Acceptable Institution criteria requiring the lender to fully collateralize the new issue letter with high-grade securities.

Canadian Depository for Securities (CDS) collateral requirements

The Taskforce is also aware that the risk-based collateral requirements of the CDS, which are designed to conform to international standards for clearing agencies. Sometimes, these require dealers to transfer very large sums of cash or other collateral on relatively short notice, in connection with trades where the dealers have the securities on hand for delivery or they are available following purely administrative steps. The Taskforce also understands that the amounts of collateral required can be unpredictable to operational personnel of dealers. In addition, the amounts of collateral required may not reflect the actual risk being assumed.

Recommendation:

The Taskforce recommends that the OSC work with IIROC to review the applicable sections of the standard uniform subordinated loan agreement to assess if a proposal to remove the prioritization of claims by banks is warranted, or to create a level playing field, if other lenders should also receive this prioritization when they lend.

Furthermore, the Taskforce recommends that the OSC work with IIROC in the near term to initiate a working group of industry (including independent dealers) and other stakeholder participants to study applicable existing IIROC rules for underwriting commitments and develop a proposal to resolve any applicable issues identified. IIROC should ensure that consideration is given to making it easier for non-bank affiliated dealers to access capital where identified benefits can be realized while managing applicable risks.

Lastly, the Taskforce recommends that the OSC work with CDS to consider alternatives to manage collateral requirements that might significantly impact critical sources of liquidity for independent dealers in certain circumstances.

29. Permit proceeds from disposition to be reinvested above the investment limit maximums under the Offering Memorandum (OM) prospectus exemption

After the AI prospectus exemption, the Offering Memorandum (OM) prospectus exemption was the second most relied upon prospectus exemption for individual investors. From 2017–2019, the gross proceeds raised in Ontario using the OM prospectus exemption increased from \$136 million to \$202 million. In comparison, the gross proceeds raised in Ontario using the AI prospectus exemption increased from \$81.8 billion to \$83.8 billion during that same period. The OM prospectus exemption has been underused since it was introduced in 2016.

Throughout the consultation, stakeholders have commented on the need to increase capital-raising opportunities for companies and allow investors to participate in more financing opportunities, including making changes to prospectus exemptions to widen the investor base.

Recommendation:

To facilitate capital formation and help increase the market's use of the OM prospectus exemption, the Taskforce recommends allowing the re-investment of proceeds from disposition through the OM prospectus exemption to not be counted towards the 12-month preceding \$100,000 investment limitation. In particular, this recommendation would apply to an eligible investor who is an individual having received advice from a portfolio manager, investment dealer or EMD and meets suitability requirements.

This recommendation relates to the \$100,000 investment limit set out in the OM prospectus exemption in section 2.9 of NI 45-106. The portfolio manager, investment dealer or EMD would continue to be subject to all obligations to make and document its determination that the re-investment of proceeds from disposition and any new investment under the OM prospectus exemption continues to be suitable for the investor. Similarly, this recommendation would not limit in any way a registrant's obligations under the Client Focused Reforms (CFRs) once implemented.

30. Expand the civil liability for offering memorandum misrepresentation to extend to parties other than the issuer

Recently introduced prospectus exemptions, such as the offering memorandum prospectus exemption, and proposed new prospectus exemptions, including those recommended by the Taskforce, provide issuers with greater flexibility to distribute securities to retail investors. The rights of action for misrepresentations in an offering memorandum that contains a misrepresentation are more limited in Ontario than in other Canadian jurisdictions. For example, in Ontario claims may only be made against the issuer, not directors or promoters of the issuer.

Recommendation:

To enhance the integrity of the exempt market, the statutory liability in respect of a misrepresentation in an offering memorandum should also apply to the key actors who are responsible for the issuer's disclosure, such as its board of directors, promoters, influential persons and experts. This would create incentives for these individuals to take reasonable steps to ensure that the disclosure provided to prospective purchasers is accurate and does not contain misrepresentations. This also increases harmonization with the other major Canadian jurisdictions, such as British Columbia. As under the current legislation, the OSC should have the authority to designate which types of documents and which prospectus exemptions are subject to the rights of action.

31. Provide the OSC with rulemaking authority to adapt prospectus liability to address regulatory gaps resulting from new and evolving financing structures

The rights of action under the *Securities Act* for misrepresentations in a prospectus are fundamental to investor protection. There are potential regulatory gaps that arise if convertible or exchangeable securities are distributed under a prospectus, in multi-stage financings, in financing transactions involving plans or arrangements or other restructuring transactions or in more complicated financing structures involving multiple related issuers. Currently, these gaps are addressed through undertakings or contractual rights.

Recommendation:

To enhance the integrity of the prospectus system, the Taskforce recommends providing the OSC with rulemaking authority to prescribe: (i) the class of purchasers entitled to benefit from the statutory remedies for misrepresentations in a prospectus; (ii) the parties subject to claims; and (iii) potential defences applicable to such parties, in circumstances where there is uncertainty regarding the interpretation of the liability provisions or legislative gaps that undermine the intent of those provisions.

32. Give the OSC additional designation powers

An expansion of the OSC's powers to designate novel products as securities would provide regulatory clarity to businesses with unique offerings and appropriate protection to investors.

Digital assets and crypto assets continue to be an emerging area of the capital markets. There are a variety of different types of crypto assets meriting different approaches to regulation. For example:

- Certain crypto assets, such as Bitcoin and Ether, share many similarities with commodities, and are not currently in and of themselves, securities or derivatives;
- Other crypto assets, such as digital or tokenized versions of traditional securities or derivatives with crypto assets as an underlying interest, are classified as securities and/or derivatives and are subject to regulatory requirements; and
- "Crypto-asset contracts" (i.e., contractual rights to receive crypto assets), which in many cases constitute securities as evidence of indebtedness and investment contracts, are currently subject to regulatory requirements and may raise significant investor protection concerns.

As technology evolves, variations to the features of crypto assets give rise to uncertainty around the classification of these assets. Some of these assets or related business models may raise investor protection concerns that are not addressed under the existing regulatory framework. However, designation powers should be exercised with caution. While certain financial assets such as crypto assets may benefit from the OSC's regulatory oversight, other assets or business models may raise fewer investor protection concerns and would not benefit from regulatory oversight. Jurisdictions, including the U.K. and the European Union, have recently proposed comprehensive frameworks for the regulation of certain types of crypto assets.

Recommendation:

To provide additional regulatory certainty in connection with novel products, including crypto assets, the Taskforce recommends providing the OSC with designation powers.

1. Designate Crypto Assets

As the nature and variety of crypto assets and the related business models are still evolving, the ability to designate crypto assets would be useful in addressing any issues that may arise, provided that the OSC's regulatory oversight would be appropriate. Given the transformative impact on the capital markets, providing the OSC powers to designate certain crypto assets as securities and/or derivatives would alleviate market uncertainty.

2. Other Designation Powers

The Taskforce also recommends giving the OSC expanded designation powers to align with the proposed draft legislation under CCMR and other legislation such as the British Columbia *Securities Act*, to provide the OSC with the authority to make an order designating:

- A derivative, or a class of derivatives, to be a security;
- A security, or a class of securities, to be a derivative;

- A contract or instrument, or a class of contracts or instruments, to not be a derivative; and
- A security, or a class of securities, to not be a security.

33. Provide an exemption from the disclosure of conflicts of interest in connection with private placements to institutional investors

Ontario institutional investors routinely participate in international securities offerings involving a wide range of issuers and dealers. However, Ontario and Canadian securities regulations require institutional investors to receive disclosure requirements above and beyond other foreign jurisdictions. The Taskforce heard in the consultation from institutional investors that this disclosure does not provide additional benefit to sophisticated investors, who perform their own due diligence in participating in international deals. Furthermore, these additional Canada-specific requirements may create a disincentive to include Ontario institutional investors in transactions — as the dealer or issuer has to spend additional time and resources for the added disclosure. This can leave Ontario’s institutional investors at a disadvantage to their global peers. While this disclosure may be appropriate for investors generally, it is not necessary where the investor is a sophisticated institution, such as a pension fund.

Recommendation:

In order to improve access to international investments and reduce unnecessary red tape, the OSC should provide an exemption from disclosure requirements to facilitate investments by Canadian institutional investors, where securities law requirements may act as a barrier to participation in international offerings and investors who benefit from those requirements do not require the protection. As well, the exemption should not prejudice any other party or negatively impact the market oversight by the OSC. The OSC should provide such an exemption to the disclosure requirements under NI 33-105 and conduct a review of other requirements for similar potential exemptions.

2.3 Ensuring a Level Playing Field

Healthy competition fosters fair and efficient capital markets by creating an ecosystem that can provide more choice for investors and opportunities for entrepreneurs. The Taskforce envisions a regulatory framework that leads to a level playing field between small and large market participants, where an appropriate level of competition helps grow Ontario’s economy.

In our consultations, smaller intermediaries have noted the challenges and frustrations they face when they are unable to continue to assist their growing clients’ needs in accessing capital. To ensure an appropriate level of competition, the Taskforce includes recommendations that aim to increase capital raising opportunities for small intermediaries and increase the variety and quality of independent investment products available to retail investors.

Globally, the relationships between investors and issuers continues to evolve. Companies and their shareholders are realizing that diverse boards and executives provide more effective and capable oversight and strategic direction.

These recommendations are aimed to drive competition among intermediaries and products and provide investors with more choice in their investment decisions.

34. Enhance restrictions on tying commercial lending services and capital markets activities to facilitate growth of independent dealers and ensure issuer choice

Facilitating the incubation of entrepreneurial and venture issuers is critical for the growth of our primary market in Ontario. Independent investment dealers and issuers have repeatedly raised the issue of intermediaries engaging in practices that may impede competition, such as arrangements where a commercial lender requires clients to retain the services of an affiliated investment dealer for their capital raising and advisory needs, as a condition in commercial lending transactions. As a consequence, issuers do not maintain existing relationships with the independent investment dealer or exempt market dealer who intermediated their early capital raising activities.

Although tied selling is restricted under the *Bank Act*, as well as National Instrument 31-103, the Taskforce has heard repeatedly from dealers and issuers that commercial lenders, through their affiliated dealers, continue to engage in these practices. We heard from multiple stakeholders that these practices are having significant negative impacts on the viability of independent dealers and on the ability of issuers to receive independent advice and on competition. However, we also learned that some intermediaries indicate that their bundling of capital markets services and other services may result in lower financing costs for issuers.

Furthermore, the Taskforce heard that some commercial lenders and their affiliated investment dealers calculate their return on capital across product lines. Then, in order to meet an internally specified client threshold return, they are requiring issuers and clients to which they have extended credit to transfer capital markets business to their affiliated investment dealer.

In addition, it may not always be in the best interest of issuers to procure their underwriting and advisory services from their lender — they may benefit from independent advice.

Recommendation:

To address this concern, the Taskforce recommends the following:

1. Enhance the Tied-Selling Restriction in National Instrument 31-103

The Taskforce recommends making legislative amendments to Ontario securities legislation, including amendments to National Instrument 31-103 and/or through the adoption of a local rule, to prohibit registrants, as a consequence of an exclusivity arrangement, from providing capital markets services under certain circumstances.

An exclusivity arrangement would be defined to exist when:

- There is an outstanding loan, a loan proposed to be made or the continuation of an outstanding loan including any modification thereof, with an issuer or any affiliate; and

- In connection with such loan, a bank practically or legally imposes a requirement for such a loan to be made or maintained pursuant to an agreement, commitment, or understanding that an affiliate of the bank (typically a bank-owned dealer) be retained to provide capital markets services, as defined, for the issuer or an affiliate thereof, or be required to be retained for future capital markets services.

Capital markets services would be defined to include debt and equity financing activities such as acting as a dealer or underwriter in an equity or debt offering or negotiating a new or existing credit facility, as well as M&A advisory activities such as providing a fairness opinion on a transaction.

The Taskforce believes that providers of capital markets services should compete on their merits and that an issuer should be free to choose the registrant that best suits its needs without a concern that its choice of registrant may negatively impact the availability of credit to the issuer. Accordingly, it would be prohibited for a registrant affiliated with a commercial lender to provide capital markets services to an issuer in circumstances such as the exclusivity arrangement defined above, where the affiliated commercial lender has previously tied a decision to extend, renew or limit credit to the issuer on whether the issuer provides capital markets business to the affiliated registrant.

2. Attestation

A senior officer of a registrant such as the Ultimate Designated Person, would be required to attest that no such prohibited conduct has occurred each time the registrant provides such capital markets services to a reporting issuer with whom the affiliated commercial lender has a banking relationship.

As part of the attestation, the registrant should engage with the affiliated commercial lender to ensure that such conduct did not occur. The Taskforce would expect that commercial lenders provide meaningful support and cooperation to their affiliated registrant firms in complying with this attestation requirement. If it becomes apparent that this is not occurring, the OSC should consider imposing terms and conditions on the registration of the affiliated registrant that would restrict its ability to act as a dealer or underwriter in offerings involving an issuer that has a relationship with a commercial lender affiliated with the registrant.

3. Amend NI 33-105 to require an Independent Underwriter with a Connected Issuer

The Taskforce recommends that the OSC work with the CSA to amend National Instrument 33-105 and/or through the adoption of a local rule to require an Independent Underwriter in prospectus offerings:

- The issuer would be considered a “connected issuer” to one or more of the underwriters involved in the offering by virtue of any commercial lending relationship between an affiliate of the underwriter and the issuer.

The Taskforce recommends adding a definition that considers an issuer that has a commercial lending relationship with an affiliate of the registered firm as a “connected issuer” and thus, under the new amendment to NI 33-105, at least one Independent Underwriter would be required in a syndicate.

The Independent Underwriter would be required to underwrite at least 20 per cent of the offering or receive at least 20 per cent of the total fees. These steps are carefully tailored to ensure that this requirement would be in line with provincial jurisdiction over registrants.

The Taskforce recommends that the OSC work with the CSA to update the Companion Policy to NI 33-105 to clarify that commercial lending relationships that would rely on the underlying credit of the issuer would be presumed to give rise to a connected issuer relationship.

Where part or all of the proceeds of the offering are intended to be used to repay indebtedness to a commercial lender affiliated with an underwriter involved in the offering, there exists an acute potential conflict of interest between the underwriter and the issuer. In these cases, the role of an independent underwriter in structuring and pricing the transaction is particularly important. Accordingly, the OSC should consider introducing a new requirement that an independent underwriter act as the lead manager or co-lead manager (or “bookrunner” or “co-bookrunner”) for offerings in these circumstances.

For greater clarity, if the proceeds of the underwriting are used to pay down a commercial loan (of a syndicate member), the Independent Underwriter would then be required to be a book runner.

4. Ban on Restrictive Clauses

Finally, where a registrant of an affiliated lender provides capital markets services, the Taskforce recommends a ban on certain restrictive clauses in capital markets engagement letters. This includes agreements that restrict a client’s choice of future providers of capital market services (as defined above), such as “right to act” and “right of first refusal” clauses, where a commercial lending and capital markets relationship exists. This would align with the U.K. Financial Conduct Authority’s similar enacted ban in 2017.

The above recommendations in relation to the provision by registrants of capital market services to issuers are focused on non-investment fund issuers and exemptions for investment funds should be provided where similar competitive concerns do not arise.

These recommendations would create competition in Ontario’s capital markets, incubate a diverse and healthy intermediary market and increase choices for issuers, without dampening existing economic activities. The objective of these recommendations is to significantly increase the amount of competition in Ontario’s capital markets. In this regard, the Taskforce recommends that the OSC be mandated to review the effectiveness of these recommendations in achieving this objective after implementation. If it is determined that the recommendations are not having the intended outcome, then the OSC would proceed with further reforms.

35. Increase access to the shelf system for independent products

Ontarians saving for their retirement should have access to the best products available in the market, given their personal financial position, sophistication and circumstances. Currently, a majority of the distribution of investment products to investors is through bank-owned shelf distribution channels. There have been concerns raised that such product shelves incentivize the sale of proprietary products and restrict access to products from independent product manufacturers. In the case of smaller independent manufacturers, their products are often suggested to be of higher risk and, as such, excluded from the shelf.

In October 2019, the OSC released the CFRs, which include conflicts of interest requirements that, as of June 30, 2021, will require dealers that offer independent products in addition to related products to ensure that their shelf development and know-your-product processes, as well as their advisors' product recommendations, are not biased towards proprietary products.

Recommendations:

The Taskforce supports the OSC's CFRs initiative. It is critical that recommendations in this area support the CFRs and the requirement that all registered firms address conflicts of interest, including those related to product shelves and the sale of proprietary products, in the best interest of their clients. The Taskforce recommends increased OSC and SRO oversight of product shelf issues, including targeted reviews and publication of guidance regarding conflicts of interest as a result of shelf composition.

The Taskforce recommends the following measures be taken, in addition to the CFRs, to help ensure that conflicts of interest relating to product shelf development are addressed in the best interest of clients and that there is a level playing field for all products in gaining access to distribution channels and competing on their merits as investment products.

1. Guidance on New Product Committees

The Taskforce recommends that the OSC publishes guidance to address product shelf issues and outline the makeup of New Product Committees. This guidance would prohibit input from related and proprietary product divisions in the decision-making of these committees. As well, New Product Committees should include dealing representative representation. In addition, the Taskforce recommends that dealers with open shelves be required to consider new securities to be made available to clients where those securities are proposed for inclusion on the shelf by their dealing representatives, and that they include them on their shelves unless there is a reasoned basis for exclusion.

2. Title Clarification for Proprietary Product

Investor protection stems from an effective compliance system, which includes disclosure obligations, and is established through internal controls. Any firm selling proprietary products is required to have internal controls that address the material conflicts of interest raised by selling proprietary products. It is critical that investors are aware that they are not receiving independent advice when purchasing in a proprietary channel. To assist with investor awareness, the Taskforce recommends that the OSC

work with the SROs to develop a regime that will clarify titles for all registrant categories and will provide additional clarity to investors with respect to proprietary channels.

3. Shelf Documentation and Proprietary Product Tracking

The Taskforce recommends that all dealers that sell proprietary products be required, by OSC rule, to document, in detail, their rationale when independent products are refused access to their product shelves. The Taskforce also recommends, by OSC rule, that dealers that sell proprietary products report to the OSC, on a quarterly basis, the percentage of proprietary versus independent products on their product shelves, segmented by channel and product category, and the percentage of proprietary versus independent products sold to clients in the same format. The OSC shall in turn publish a summary of these findings on an annual basis.

4. Independent Manufacturer OSC Reporting

Independent product manufacturers should be encouraged to report to the OSC, on a confidential basis, instances where their products are refused access to a product shelf and the Taskforce recommends that the OSC track this information. The OSC should provide a dedicated channel and format for these concerns to be submitted.

5. Limited Market Check

As part of the OSC/SRO compliance reviews, the Taskforce recommends that OSC/SRO review the findings of a limited market check analysis (outlined below) conducted by the dealer and the remediation implemented by the dealer to ensure that the analysis is robust and the remediation is suitable and timely.

All dealers that offer proprietary products must have a process in place to, on an annual basis:

- Conduct periodic due diligence on a number of comparable unrelated products available in the market;
- Evaluate whether the proprietary products are competitive with the alternatives identified, by examining factors including cost, risk and returns; and
- Determine what action the dealer should take in respect of its proprietary offerings or otherwise if it determines that those proprietary products are not competitive, in order to demonstrate that it has addressed conflicts of interest associated with offering proprietary products in the best interest of clients.

Dealers would be able to discharge this requirement in a way that is proportionate to the size and scope of their product offerings. Records must be kept by dealers of the due diligence, evaluations and outcomes under their processes, and these would be examined during OSC/SRO compliance reviews. In their evaluations, dealers must exclude any discounts on execution costs that they provide to clients for purchases and sales of securities of related products from consideration when conducting a cost analysis of comparable unrelated products.

The objective of these recommendations is to significantly increase non-proprietary products in distribution channels. The Taskforce is mindful that these measures and CFRs may lead some institutions to consider closing or narrowing their product shelves. However, it is in the public interest that distribution channels are open architecture, including both proprietary and non-proprietary products. In this regard, the Taskforce recommends that the OSC be mandated to review the effectiveness of these recommendations in achieving this objective within three years after implementation. If it is determined that the recommendations are not having the intended outcome then the OSC would proceed with further reforms, including banning proprietary channels.

36. Improve corporate board diversity

In accordance with National Instrument 58-101 *Disclosure of Corporate Governance Practices*, since 2014, TSX-listed companies have been required to disclose their approach to gender diversity, including data regarding the representation of women on boards of directors and in executive officer positions. The disclosure follows a “comply or explain” model and does not require TSX-listed companies to adopt any gender diversity policies and practices, including targets. Progress has been slow, with the OSC reporting that the total board seats occupied by women in their review samples only increased from 11 per cent in 2015 to 17 per cent in 2019.⁴¹ Based on the CSA’s 2019 review, only 22 per cent of companies in their review sample had adopted targets regarding the representation of women on boards.⁴²

A recent study by Catalyst and the 30% Club Canada found that in 2019,⁴³ women only represented 19.4 per cent of boards and 17.0 per cent of executive teams in companies that disclosed themselves as TSX-listed issuers. A recent study highlighted that of the 213 CBCA companies that disclosed board diversity data, only 5.5 per cent of all directors were visible minorities. Indigenous directors and directors with disabilities made up 0.5 per cent and 0.4 per cent of board diversity, respectively.⁴⁴

⁴¹ Canadian Securities Administrators. (2019, October).

⁴² Canadian Securities Administrators. (2019, October).

⁴³ Catalyst & 30% Club. (2020).

⁴⁴ Osler, Hoskin & Harcourt LLP. (2020, October).

Investors are increasingly demanding data on diversity on boards and in executive officer positions to make informed investment and voting decisions.⁴⁵ As of this year, all public companies governed by the CBCA are required to report representation of the following designated groups on boards of directors and in senior management: women, Indigenous peoples, persons with disabilities and members of visible minorities. Diversity disclosure information must be sent to shareholders (with the notice of the meeting) and Corporations Canada.⁴⁶

From the Taskforce's public consultation, many commenters support corporate board diversity beyond gender and agree that board renewal is important to enhancing diversity.

Recommendation:

The Taskforce recommends:

1. Board Diversity Targets and Timelines

Amend Ontario securities legislation to require publicly listed issuers in Canada to set their own board and executive management diversity targets (aggregated across both groups) and implementation timelines, and annually provide data in relation to the representation of those who self-identify as women, BIPOC, persons with disabilities or LGBTQ+ on boards and executive management. For greater clarity, this would apply to directors and executive management, the latter of which is defined as those who are executive officers or Named Executive Officers of publicly listed issuers.

The Taskforce recommends that publicly listed issuers set an aggregated target of 50 per cent for women and 30 per cent for BIPOC, persons with disabilities and LGBTQ+. Implementation of these targets should be completed within five years to meet the target for women and seven years to meet the target for the other diversity groups, placing specific focus and emphasis on representation of Black and Indigenous groups.

2. Written Policy for Director Nomination Process

Amend Ontario securities legislation to require publicly listed issuers to adopt a written policy respecting the director nomination process that expressly addresses the identification of candidates who self-identify as women, BIPOC, persons with disabilities or LGBTQ+ during the nomination process.

⁴⁵ McKinsey & Company. (2018, January 18). Delivering through diversity. <https://www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity.pdf>

⁴⁶ CBCA diversity disclosure information includes disclosure such as term limits and board renewal, board diversity policy, consideration of diversity in nominating directors, number and percentage of directors and members of senior management are designated group members, etc.

3. Maximum Board Tenure Limits

Amend Ontario securities legislation to set a 12-year maximum tenure limit for directors of publicly listed issuers, with an exception for: (a) 15-year maximum tenure limit for the Chair of the board; (b) non-independent directors of family-owned and controlled businesses, where such nominees represent a minority of the board; and, (c) no more than one other director who will be deemed not to be independent, and will still have a 15-year limit. Issuers must implement this recommendation within three years of this amendment taking effect. This is aimed to encourage an appropriate level of board renewal. The issue of board entrenchment and board renewal is a concern from a governance perspective as continued refreshment of the board helps to ensure that independent, fresh and diverse perspectives and skills are brought into the boardroom.

4. Diversity at the OSC

The Taskforce recommends that diversity — including racial diversity — be similarly represented at the board and executive level of the OSC, which will be responsible for discharging this important mandate. As part of the OSC's Statement of Priorities (which was published for consultation in November 2020), the OSC committed to take actions as outlined in the Black North Initiative CEO pledge to end anti-Black racism.

37. Introduce a retail investment fund structure that pursues investment strategies in less liquid private equity and debt markets, including in early-stage businesses

The Taskforce heard that there is a funding gap for small issuers that want to raise capital for their business and that it is becoming prohibitively costly for an issuer to become publicly listed. In addition, there are many retail investors who want to invest in these types of investments. However, retail investors are often prohibited by securities regulation from investing in early-stage, private market opportunities and have difficulty navigating a complex environment.

“Institutional and high net worth investors have increasingly been allocating investment capital to private market opportunities — an investment space that remains largely inaccessible to retail investors. There has been an increasing trend for private companies to stay private longer, thereby creating even further disparity between retail and non-retail investor experiences...the OSC should be focused on promoting a broader range of investment accessibility and choice for retail investors.”

AGF Management Limited/AGF Investments Inc.

Retail investors often require the investment expertise of asset managers using established distribution channels of public funds. The same investment fund model that has been used in the public markets, which provides retail investors with cost-effective and diversified investments can be further applied to the private markets.

Through the consultations, many stakeholders were supportive of providing retail investors with access to private equity investments, provided that appropriate investor protection mechanisms are incorporated.

Recommendation:

The Taskforce recommends that the OSC establish a retail private equity investment fund proposal for public input to incorporate private equity investing best practices, and the advantages of the retail investment fund model. This proposal should examine other jurisdictions for examples, such as the interval fund concept in the U.S. Such a proposal must be appropriately balanced with investor protection safeguards.

In traditional mutual funds, investors have the right to redeem on a frequent basis, so mutual funds must be primarily invested in liquid investments to meet those redemption obligations. In an interval fund, retail investors do not have the right to redeem. Instead, the fund has the control to provide liquidity to investors at pre-determined times (e.g., every three, six or twelve months) by offering to buy back a stated portion of its shares (typically 5 per cent to 25 per cent) from investors. Investors are not required to accept these offers.

Given the periodic repurchase schedule of an interval fund (as opposed to the daily redemption associated with a conventional mutual fund), portfolio managers can take a longer-term investment view and take advantage of investing in less liquid, potentially higher-return asset classes that may not be suitable for a conventional mutual fund offering daily liquidity. This may enable a portfolio manager to invest in more “private equity” type investments.

2.4 Proxy System, Corporate Governance and Mergers and Acquisitions

The public capital markets provide issuers with access to a larger and more diversified pool of capital-raising opportunities than the private markets. Confidence in the public markets is predicated on the principle that public companies are accountable to investors through robust governance mechanisms intended to align the interests of shareholders and management. However, these accountability mechanisms should not unduly inhibit risk-taking or undermine a board of directors’ role to manage the corporation in the interests of all its shareholders.

The Taskforce notes the current imbalance between activist shareholders and the boards of issuers in large part due to the current proxy and shareholder voting system. Issuers facing activist shareholder campaigns are hindered in responding effectively given the limited transparency in shareholder ownership and voting. Through our consultation, multiple stakeholders raised concerns about the disproportionate influence of proxy advisory firms in the current proxy voting process.

“In our view, PAFs are in a clear and unmitigable conflict of interest if they provide consulting services of any kind to companies for which they also provide shareholder voting recommendations.”

Invesco Canada

To restore fairness in Ontario’s proxy and corporate governance system, the Taskforce’s recommendations include a number of measures that would increase regulatory oversight of proxy advisory firms, increase transparency for both issuers and investors regarding the ownership and voting structure, and reduce the practices of empty and over-voting. These recommendations would create a modernized proxy voting and corporate governance system in Ontario.

Finally, there is increased global momentum towards enhanced disclosure of the environmental, social and governance (ESG) factors that impact a company’s financial performance. Throughout the Taskforce’s consultations, the increased use of ESG disclosure has received significant support from a variety of stakeholders, which has led to the Taskforce’s recommendation of mandating disclosure of material ESG information.

“Globally, we are seeing an increase in regulatory requirements for standardized ESG reporting, particularly in Europe. There is however no such requirement currently in Canada, and the result is a lack of standardized, decision-useful reporting. We believe that standardized ESG reporting will be important for Canada to remain an attractive market for global investors.”

Canadian Coalition for Good Governance

The following Taskforce recommendations aim to modernize and enhance the corporate governance standards and proxy voting framework for Ontario’s public companies. These recommendations range from providing a regulatory framework that assists companies to better address stakeholder concerns, providing greater transparency around the ownership of public companies to enhancing shareholder rights over director elections and executive compensation.

38. 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

PAFs play an important role in the proxy voting process. Institutional investors often retain PAFs to analyze proxy materials and provide voting recommendations as part of their investment decision-making processes. Issuers and other stakeholders have expressed concerns about the influence of PAFs, errors in the reports produced by PAFs, and conflicts of interest arising from PAFs’ voting recommendations in respect of for issuers that have simultaneously retained the same PAF to provide consulting services.

Recommendation:

The Taskforce recommends introducing a securities regulatory framework for PAFs by September 1, 2022 to ensure that PAFs’ institutional clients are provided with the issuer’s perspective concurrent with the PAF’s recommendation report.

1. Statutory Right to Rebut

Providing an issuer with a statutory right to rebut (at no cost) the reports published by PAFs. In order to avail themselves of this right of rebuttal, issuers would be required to publish the relevant materials (such as the management information circular (MIC)) within a specified time prior to the meeting. This right of rebuttal would apply, with respect to each of the issuer’s resolutions, when the PAF is

recommending to its clients to vote against management's recommendations. The PAF would be required to include the rebuttal in the report it provides to its clients.

2. Addressing Conflicts of Interest

Implementing a framework to address conflicts of interest by restricting the ability of PAFs to provide consulting services to issuers in respect of which they also provide voting recommendations to their clients.

3. Minimum Period for Issuers to File a MIC in Advance of a Shareholder Meeting

Corporate and securities laws permit issuers to send and file a management information circular less than 30 days prior to the date of the applicable shareholder meeting.

The Taskforce recommends introducing a requirement that an issuer intending to exercise its right of rebuttal must file the management information circular at least 30 days prior to the date of the applicable meeting. This requirement would facilitate the exercise of the issuer's right of rebuttal by providing the PAF with enough time to include the rebuttal in its report and satisfy the PAF's obligation to provide its report to clients for their consideration in a timely manner.

39. Decrease the ownership threshold for early-warning reporting disclosure from 10 to 5 per cent for non-passive investors

Currently, a shareholder is not required to disclose beneficial ownership of, control or direction over, voting or equity securities of an issuer until they reach the threshold of 10 per cent of the issuer's shares. However, share ownership at the 5 per cent level is relevant to control of an issuer, given that a shareholder can generally requisition a shareholders' meeting if it holds 5 per cent of an issuer's voting securities. Other global jurisdictions, such as the U.S. and U.K., mandate ownership disclosure at the 5 per cent level, or even lower in certain circumstances.

In an era of increasing shareholder activism, the 10 per cent early-warning reporting threshold does not provide adequate transparency to issuers and investors.

Recommendation:

The Taskforce recommends decreasing the shareholder reporting threshold in Ontario from 10 per cent to 5 per cent for non-passive investors. Accordingly, disclosure of significant holdings starting at the 5 per cent level would apply if an investor intends to make a take-over bid, proposes a transaction that would result in the investor gaining control of an issuer, or solicits proxies against any director nominees or corporate actions proposed by the management of an issuer.

These non-passive shareholders who cross the 5 per cent ownership level, or who become non-passive when owning 5 per cent or more of an issuer's shares, should be required to file a news release and early-warning report disclosing their ownership but not be subject to a moratorium on further acquisitions following the disclosure of their ownership until their ownership increases to the 10 per cent level.

40. Require all publicly listed issuers to have an annual advisory shareholders' vote on the board's approach to executive compensation

There is a growing recognition in Canada and globally that periodic advisory votes on executive compensation provide critical input to boards and facilitate shareholder engagement. Many stakeholders have indicated that they support the implementation of a mandatory vote on a board's approach to executive compensation for issuers.

Recommendation:

The Taskforce recommends the adoption of mandatory annual advisory votes on executive compensation practices for all publicly listed issuers. However, the annual votes should be non-binding votes to preserve the board of directors' decision-making authority and avoid the risk that shareholder proposal campaigns become too burdensome on issuers.

41. Require enhanced disclosure of material ESG information, including forward-looking information, for public issuers

Globally and in Ontario, there is increased investor interest in issuers reporting on ESG-related information. According to a recent survey from RBC Global Asset Management, 98 per cent of Canadian institutional investors expect ESG-integrated portfolios to perform as well as or better than those that do not integrate ESG.⁴⁷ As well, over 75 per cent of global investors surveyed now incorporate ESG principles into their investment decision process.⁴⁸ While many issuers provide ESG disclosure, both issuers and investors have expressed concerns about the lack of a standardized framework for this disclosure.

Creating a uniform standard of disclosure can enable an equal playing field for all issuers and lead to enhanced ESG disclosure can improve access to global capital markets. As well, the lack of a standardized framework can lead to excess compliance costs as issuers attempt to navigate an ambiguous framework. In 2018, the Ontario government's Made-In-Ontario Environment Plan included a commitment to enhance corporate disclosure of climate-related financial risks.⁴⁹

Throughout the Taskforce's public consultations, the increased use of ESG disclosure has received significant support from a variety of stakeholders ranging from issuers, investment firms, banks, and law firms. Recently, leading global accounting firms, in collaboration with the World Economic Forum, have urged the global companies which are part of the International Business Council to adopt ESG standards for 2021 reporting.

⁴⁷ Royal Bank of Canada. (n.d.).

⁴⁸ Royal Bank of Canada. (n.d.).

⁴⁹ Government of Ontario. (2020, November 27). A made-in-Ontario environment plan. <https://www.ontario.ca/page/made-in-ontario-environment-plan>

Currently, a widely prevalent framework that has global support and meets investor needs for concise, standardized metrics on material climate change-related issues is the Taskforce on Climate-Related Financial Disclosures (TCFD) recommendations. In November 2020, the U.K. government also announced an intention to mandate climate-related disclosure compliant with the TCFD framework.^{50,51}

Most stakeholders also advocate for a phased implementation to allow issuers to comply with new disclosure requirements effectively. The Global Risk Institute reported that many large financial firms are already disclosing in alignment with the recommendations in the TCFD framework.⁵² However, smaller firms may require additional time to adjust.

Recommendation:

The Taskforce recommends mandating disclosure of material ESG information, specifically climate change-related disclosure that is compliant with the TCFD recommendations for issuers through regulatory filing requirements of the OSC.

1. Key Elements

The key elements of the proposed ESG disclosure requirements are as follows:

- The requirements would apply to all reporting issuers (non-investment fund).
- The requirements would include:
 - Mandatory disclosure recommended by the TCFD related to governance, strategy and risk management (subject to materiality). This would exclude mandatory disclosure of scenario analysis under an issuer’s strategy.
 - Disclosure of Scope 1, Scope 2, and, if appropriate, Scope 3 greenhouse gas emissions on a “comply-or-explain” basis.

2. Transition Phase

There would be a transition phase for all issuers to comply with the new disclosure requirements, beginning when the new requirements are implemented. The length of each issuer’s transition phase would depend on the issuer’s market cap at the time the requirements are implemented, with each issuer grouped into one of three market cap tiers that correspond to a certain transition phase.

⁵⁰ Financial Conduct Authority. (2020, November 9) Green Horizon Summit: Rising to the climate challenge. <https://www.fca.org.uk/news/speeches/green-horizon-summit-rising-climate-challenge>

⁵¹ U.K. Joint Government-Regulator TCFD Taskforce. (2020, November 9). Interim Report. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933782/FINAL_TCFD_REPO_RT.pdf. *Note:* The FCA is a member of the TCFD Taskforce.

⁵² Global Risk Institute. (2020, November). Climate-related financial disclosure in the Canadian financial sector. <https://globalriskinstitute.org/publications/climate-related-financial-disclosure-in-the-canadian-financial-sector-3/>

The transition phase would continue to apply to each issuer regardless of whether the issuer's market cap subsequently changes.

- Large cap issuers: Greater than \$500 million — Transition phase of 2 years
- Medium cap issuers: Between \$150 million and \$500 million — Transition phase of 3 years
- Small cap issuers: Less than \$150 million — Transition phase of 5 years

After the transition phase is complete, the requirements would apply to each issuer going forward.

The Taskforce encourages the CSA to proceed in alignment with Ontario and implement similar disclosure requirements across Canada.

42. **Require the use of universal proxy ballots for all contested meetings and mandate voting disclosure to each side in a dispute when universal ballots are used**

Most shareholders do not attend shareholder meetings and vote by proxy using either the company's or dissident's proxy ballot. In Canada, these proxy ballots tend to look very different (universal, blended, single slate, etc.) and are difficult for investors to understand. These proxy ballots typically do not allow shareholders to vote for a combination of nominees, instead forcing shareholders to vote for either the company's or dissident's nominee slate. The result is a convoluted process that inhibits the ability of shareholders to participate in proxy voting.

Recommendation:

The Taskforce recommends requiring the use of universal proxy ballots — a single ballot that lists the director nominees of each side of a dispute and allows a shareholder to vote for a combination of nominees — for all contested meetings. This would provide shareholders who vote by proxy with greater flexibility to vote for a combination of board directors. Mandating disclosure of voting tallies on an ongoing basis to each side in a dispute would provide issuers and dissidents with greater transparency.

The Taskforce's recommendation would require the consideration of additional related requirements necessary to facilitate the use of universal proxies. This would include notice requirements and minimum solicitation requirements applicable to dissidents, as well as form requirements for universal proxies. These additional considerations should be undertaken through further consultation by the OSC in implementing the recommendation.

The Taskforce expects that the changes be implemented by September 1, 2022.

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

Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions (MI 61-101) does not fully address the important role that a committee of independent directors has in evaluating, negotiating, approving and advising on conflict of interest transactions.

MI 61-101 regulates the most significant conflict of interest transactions involving large shareholders, directors and senior management. These transactions include insider bids, business combinations in which insiders are eliminating public shareholders, and significant related-party transactions with the issuer that could result in the transfer of value from minority shareholders to insiders.

Currently, MI 61-101 mandates independent director oversight when the transaction is an insider bid but only recommends as guidance the use of special independent committees in other conflict of interest transactions. As well, while the rule mandates minority approval and disclosure to permit shareholders to make an informed decision to vote, MI 61-101 only considers the role of independent directors in its companion policy and does not comprehensively address their role in reviewing these significant conflict transactions. As a result, there is inconsistency in how issuers use independent committees and inconsistent protection of minority security holder interests in how these transactions are brought to them to vote on.

Recommendation:

The Taskforce recommends that the best practices for independent committees as described in Multilateral Staff Notice 61-302 Staff Review and Commentary on MI 61-101 and OSC decisions should be codified to strengthen the role of independent directors and their advisors and give minority shareholders greater confidence in the function of independent committees related to transactions regulated under MI 61-101. In particular, the Taskforce recommends mandating the formation of independent committees to oversee material conflict of interest transactions and the adoption of policy guidance on independent committee practices.

44. Provide the OSC with a broader range of remedies in relation to mergers and acquisitions (M&A) matters and modernize the private issuer take-over bid exemption

The OSC has recognized that the public interest in promoting fairness to shareholders applies to all forms of contests to acquire control of reporting issuers, including both take-over bids and proxy contests. However, the remedies available to the OSC to intervene under section 104 and section 127 of the *Securities Act* do not adequately address the breadth of compliance and public interest matters engaged in M&A matters and proxy contests.

While the OSC generally has sufficient authority to address abusive transactions in the take-over bid context through its cease-trade power and other section 127 powers, these powers may not always be sufficient in a proxy contest or other M&A matter where control is being obtained through a shareholder vote rather than an acquisition of securities. Outside of a review of an exchange decision, the OSC does not have authority to unwind a transaction or prevent a person from exercising a voting right. Parties generally need to go to court to seek these remedies.

Commenters were generally supportive of ensuring the OSC has the same remedies as the British Columbia Securities Commission (BCSC) and not having to defer to the courts as a result of a lack of appropriate remedies when addressing matters that should properly be considered by securities regulators.

The private issuer take-over bid exemption also does not adequately reflect the reality that private issuer take-over bids increasingly involve higher numbers of arm's-length security holders. The private issuer exemption for take-over bids is available for take-over bids for non-reporting issuer targets that do not have a published market and have a limited number of security holders that are not employees of the target or its affiliates. This exemption reduces the burden for bidders because they do not have to comply with the more onerous formal bid requirements that normally apply.

However, the availability of a broader range of prospectus exemptions for non-reporting issuers has resulted in some of those issuers accumulating arm's-length security holders above the existing fifty-shareholder threshold. As a result, bidders must comply with the formal bid requirements, apply for a discretionary exemption from securities regulatory authorities, or undertake alternative acquisition transactions even if a take-over bid is the preferred approach.

Recommendation:

The Taskforce recommends the following:

1. Grant OSC New Remedies

The OSC should be granted new powers to enhance its public interest remedies in control contests and similar transactions. British Columbia recently enacted legislation to provide the BCSC with new powers, including powers to rescind a transaction, require a person to dispose of securities acquired in connection with an M&A transaction or a proxy solicitation, and prohibit a person from exercising voting rights attached to a security.

The OSC should provide clarity on the circumstances in which it anticipates their remedies being appropriate, how it intends to address the overlap with courts and corporate law, and the need for procedural and evidentiary safeguards when these remedies are being requested.

2. Modernize Private Issuer Take-Over Bid Exemption

The Taskforce recommends that the private issuer take-over bid exemption be modernized by increasing the restriction on the maximum number of arm's-length security holders of the target to three hundred.

45. Prohibit voting with borrowed shares and introduce rules to prevent over-voting

A key principle of shareholder voting that underpins director elections, shareholder approval of executive compensation, M&A transactions and other shareholder rights, is that voting shareholders have an economic interest in the outcome of the election or matter being approved. The Taskforce heard concerns from investors about the risk of empty or negative voting by an investor that has acquired shares through a securities borrowing arrangement or has hedged its economic interest such that the investor is effectively an empty or negative voter in respect of their shares being voted.

There is already an industry standard that votes follow the lent share, so that a lender is not entitled to vote shares. Furthermore, there are also disclosure requirements that apply to empty voting scenarios under securities regulation. However, there is still a risk of empty voting on a case-by-case basis that could impact the outcome of a particular shareholder vote and that could require the OSC to intervene on a public interest basis, including through the additional remedies being recommended by the Taskforce.

In addition, on over-voting, many of the below proposals codify best practices found in CSA Staff Notice 54-305 Meeting Vote Reconciliation Protocols.

Recommendation:

The Taskforce recommends that the OSC provide guidance on its intention to use its public interest authority in relation to empty voting at public company shareholder meetings and remind market participants of their existing disclosure obligations under securities law.

Furthermore, the Taskforce recommends that the OSC set up a technical implementation committee with representation from the relevant participants in the intermediated holding system to address the technical issues involved in operationalizing the following rules to be introduced to prevent over-voting:

1. An intermediary must not submit proxy votes for a beneficial owner client unless it has confirmed that vote entitlement documentation has been provided to the reporting issuer's meeting tabulator.
2. An intermediary that holds securities on behalf of another intermediary must provide appropriate vote entitlement documentation to the reporting issuer's meeting tabulator to establish its client's vote entitlements.
3. A reporting issuer (or its meeting tabulator) must notify the reporting issuer and any intermediary that submits proxy votes if it rejects those proxy votes because of insufficient vote entitlements and the intermediary must promptly take steps to provide any necessary documentation to establish its vote entitlements prior to the meeting date.
4. A reporting issuer must obtain and provide to the meeting tabulator the DTC omnibus proxy 10 days or more before the meeting so that its meeting tabulator can verify the vote entitlements of U.S. intermediaries.

46. Allow reporting issuers to obtain beneficial ownership data

The need for reporting issuers to be able to engage effectively with their beneficial owners continues to grow as investors increasingly focus on emerging areas of governance, such as ESG and diversity. Shareholder activism in voting and M&A continues to be a prominent feature of Ontario's capital markets. The lack of a clear legal right for reporting issuers to know the identity of their beneficial owners hinders the ability of reporting issuers to engage in direct dialogue with their investors. It also raises concerns about the overall transparency of the proxy voting process, because reporting issuers have little insight into how intermediaries or their service provider(s) transmit proxy materials to, and solicit voting instructions from, objecting beneficial owners (OBOs).

In Canada, public issuers have limited ability to discover the identities of beneficial owners of their shares. Corporate governance legislation does not address this issue. Under NI 54-101, at the time of account opening, an intermediary must obtain instructions on whether the beneficial owner client wishes to be a non-objecting beneficial owner (NOBO) or OBO in respect of the reporting issuer securities held in that account. A reporting issuer can request a list of NOBOs and obtain a partial view of its beneficial owners of securities from intermediaries, including security and address information. Reporting issuers can use the information in the NOBO list to mail proxy materials and solicit voting instructions directly from these beneficial owners. However, issuers do not know the identities of OBOs and cannot mail proxy materials or solicit voting instructions directly.

Furthermore, NI 54-101's primary purpose is not to achieve beneficial ownership transparency. Its primary purpose is to set up processes to solicit voting instructions from beneficial owners — who would otherwise be disenfranchised because they do not have voting rights under corporate law.

Recommendation:

The Taskforce recommends that, as of September 1, 2022, public companies and other reporting issuers be able to obtain the identities and holdings of all beneficial owners of their securities. To achieve this, the Ontario government should set up a stakeholder group with representation from the relevant regulatory bodies, proxy solicitors, transfer agents, intermediaries, law firms and other stakeholder groups to develop a strategy for achieving this objective. In the interim, the Taskforce recommends that beneficial owner transparency be increased by amending securities law so that NOBO status is the default for beneficial owners.

47. Require standardized granular disclosure of securities grants and option exercises

Some investors expressed concerns that it is difficult and cumbersome to determine the total compensation that a reporting issuer's management receives in the form of securities grants and that it would be more user-friendly to include option exercises in the Compensation Statement.

Recommendation:

The Taskforce recommends that the OSC and the CSA consult on and propose amendments to Form 51-102F6 Statement of Executive Compensation (the Compensation Statement) to more explicitly standardize disclosure of securities-based compensation by requiring specified disclosure of share-based share and options awards, as well as the value that a Named Executive Officer or director receives through the exercise of options. The OSC, together with the CSA, should undertake consultations to determine whether the following changes should be adopted:

- Requiring issuers to provide a look-back analysis, which is essentially based on realized and realizable pay information including value received through exercise of previously granted option and other share-based compensation awards, together with an assessment of whether option grants have been serving their intended purpose as part of the issuer's overall compensation policies.
- Current disclosure of all value vested or realized under every prior grant of options or other share-based compensation as part of the annual compensation disclosure.
- Adopting a standardized methodology for valuing options and other compensation securities or, if not practical, providing additional guidance on best practices for valuation of grants and consistent disclosure of valuation options and assumptions.

Although this recommendation would marginally increase the burden for issuers, standardized disclosure of share-based compensation would be useful to investors.

48. Enshrine annual director elections and individual director voting requirements in securities law and implement majority voting in uncontested director elections

Two key elements of shareholder democracy are: the requirement to hold annual director elections and the requirement that directors stand for election individually (rather than as a slate). These exist under TSX and TSXV rules but are not currently enshrined in securities law. Securities laws do not prohibit staggered director terms or director terms of more than one year. Similarly, securities laws do not currently preclude a reporting issuer from requiring that shareholders vote in respect of the entire slate of director nominees presented by management rather than each director individually.

The Taskforce also received stakeholder input highlighting that majority voting in uncontested director elections was a fundamental principle of shareholder democracy. Many, but not all, reporting issuers are subject to a majority voting requirement under TSX rules. Under those rules, any director of a TSX-listed issuer that is not elected by a majority of votes cast at an uncontested meeting must immediately tender his or her resignation to the board. The board then has 90 days following the meeting to determine whether to accept the resignation and must accept the resignation absent exceptional circumstances. Similarly, recent amendments to the CBCA (not yet in force) will impose a majority voting standard on directors of all CBCA-incorporated public companies. Currently there is no majority voting standard in Ontario securities law.

Recommendation:

The Taskforce recommends adding requirements for annual director elections and individual director voting to securities law.

Furthermore, the Taskforce recommends adding a majority voting requirement to securities law. The majority voting requirement should:

- Only apply in respect of uncontested director elections;
- Provide for a reasonable transition period in the event a director does not receive a majority to allow for the recruitment of qualified replacement board members;
- Provide for an exemption where an issuer is subject to and complies with substantially similar requirements in corporate law; and
- Permit an issuer to apply to the OSC for exemptive relief in exceptional circumstances.

2.5 Fostering Innovation

Ontario is making great strides to create a favourable innovation and FinTech ecosystem. However, the continued rise in market participants with innovative business models and the evolution of new types of digital assets, necessitates that Ontario's capital markets regulatory regime continue to adapt to emerging business models and products.

Stakeholders support the need for a nimble and flexible regulator that embraces new and novel products and services. In response to stakeholder feedback, the Taskforce recommends, among others, that the regulators create an Ontario Regulatory Sandbox that would benefit

"...innovation is playing an important and growing role in Ontario's economy and regulation needs to support this."

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companies with innovative business models, a strategic focus of the OSC's Office of Economic Growth and Innovation to facilitate economic growth and innovation, and allow greater access to capital for start-ups and entrepreneurs through the assistance of angel groups.

Fostering innovation in Ontario's capital markets not only helps attract new businesses to Ontario, but also global investment into Ontario businesses.

49. Create an Ontario Regulatory Sandbox to benefit entrepreneurs and in the longer-term, consider developing a Canadian Super Sandbox

Many securities regulators, including the OSC, having recognized the emergence of FinTech, have established dedicated teams to provide further regulatory guidance and assistance to businesses with innovative business models.

Globally, regulatory sandboxes have allowed businesses to test new and innovative products, services, business models and delivery mechanisms with real consumers through expedited blanket relief orders. Sandboxes have been introduced by international regulators, such as the U.K. Financial Conduct Authority and the Australian Securities and Investments Commission, to encourage new and established companies to introduce innovative financial products and services to the market.

Through the Taskforce's consultations, stakeholders were supportive of the sandbox proposal that would help spur the growth of start-ups and businesses with innovative models. Stakeholders suggested that further collaboration with industry and market participants would be beneficial in developing and ensuring the success of the sandbox testing in Ontario.

Recommendation:

As part of the Ontario Regulatory Sandbox, the OSC and FSRA should design an approach that would offer rapid exemptive relief or use other available regulatory tools to permit companies with innovative business models operating across the financial services sector in Ontario to test new financial services and products. There are several business models that are subject to regulatory oversight that overlaps between the OSC and FSRA.

This new sandbox should allow businesses to test new and innovative products, services, business models and delivery mechanisms in the real market, with consumers:

- The Ontario Regulatory Sandbox should be a supervised space that provides businesses with:
 - Reduced time-to-market at potentially lower cost;
 - Appropriate consumer and investor protection safeguards built into new products and services; and
 - Tools such as restricted registration, guidance, and exemptions.
- The sandbox tests would be:
 - Inclusive of firms participating in different aspects of the financial services sector, ranging from capital markets activity (regulated by the OSC) to sectors such as insurance and mortgage brokering (regulated by FSRA); and
 - Time- or customer-limited, so businesses could test their innovation for a limited duration or with a limited number of customers. This may be achieved through: (i) blanket relief orders applicable to a group of similar businesses, (ii) relief orders applicable to a single business, or (iii) in limited circumstances, “no action letters.”
- The Ontario Regulatory Sandbox would also provide the province’s two primary financial services regulators with greater opportunities to collaborate and identify areas where they could evolve regulatory requirements to better reflect the changing needs and abilities of businesses operating in this new era of digital innovation.

The Taskforce recommends that the OSC and FSRA continue engaging with market participants, such as new and existing start-ups and incubators/accelerators, so that the sandbox not only sufficiently identifies and addresses challenges and concerns faced by businesses, but also balances the need to protect investors, and maintain fair and efficient capital markets.

In the longer term, the Taskforce recommends considering an expansion of this Sandbox into a Canadian Super Sandbox in which all provincial and federal financial services regulators allow Canadian financial services businesses to test their innovative ideas. This would spur innovation nationally.

Within five years after the implementation of the Ontario Regulatory Sandbox, the OSC and FSRA must consider if this initiative merits continuation or can be eliminated.

50. **Highlight that a strategic focus of the OSC's Office of Economic Growth and Innovation (Innovation Office) should be on facilitating economic growth and innovation, including being an advocate for smaller innovative businesses, and expand the range of the Innovation Office's services**

In June 2020, the OSC announced the launch of the Innovation Office aimed at expanding the work of OSC LaunchPad through deeper engagement with businesses and support for a strong innovation ecosystem in Ontario. It will be accountable for driving the implementation of the initiatives set out in the OSC's 2019 Reducing Regulatory Burden in Ontario's Capital Markets report, and for driving other changes to its rules, regulatory operations or processes to reduce burden. In addition, the Innovation Office will conduct extensive outreach with the market, innovation hubs, other regulators and government to identify opportunities for the OSC to champion innovation and economic growth.

Aside from providing a more innovative regulatory environment for FinTech businesses, an expansion of the Innovation Office's services would also align with and support the recommendation to expand the OSC's mandate.

Recommendation:

The Taskforce recommends that the Innovation Office place a primary strategic focus on facilitating economic growth and innovation, including fostering and testing new and innovative methods to improve transparency in financial product intermediation, improving the cost-benefit of providing investment advice and advocating for smaller innovative businesses.

Similar to the U.S. Securities and Exchange Commission's Office of the Advocate for Small Business Capital Formation, and its Strategic Hub for Innovation and Financial Technology, recently announced by the SEC to become a stand-alone office, the new Innovation Office should also consider:

- Identifying and researching challenges that smaller businesses, including those with innovative business models, experience when raising capital;
- Conducting outreach to businesses and their investors to solicit views and solutions to lower access and trading costs, increase transparency and foster capital formation issues;
- Assisting business, including innovative and smaller businesses and their investors in resolving significant problems with capital markets regulation; and
- Identifying capital markets regulation changes that would benefit smaller and innovative businesses and their investors.

In addition, to provide greater support for businesses participating in the Ontario Regulatory Sandbox, the Taskforce recommends that the Innovation Office should seek more timely input and feedback on its services.

Examples of services the Innovation Office may consider include:

1. Enhanced Engagement with the Innovation Community

The Innovation Office could consider more in-depth engagement with venture capital firms, law firms, advisors and angel investors to create a community for novel businesses to assist early-stage companies.

For example, akin to matching services, partnerships with external organizations such as incubators and accelerators that have resources for early-stage businesses looking for business expertise and capital; and legal and advisory service providers that provide start-ups with access to legal services in areas such as capital raising, preparing offering documents, and intellectual property and patents.

2. Educational Resources

The Innovation Office could also host webinars and develop e-learning resources targeted at addressing common issues that innovative businesses face in their early stages for topics including, but not to, limited registration process and requirements and capital raising for start-ups, such as preparing offering documents.

These educational resources may later also be made available to all businesses and not only to FinTech companies.

3. Regulatory Technology (RegTech) and Supervisory Technology (SupTech) Tools

The Innovation Office should consider how RegTech and SupTech solutions such as automated compliance tools can benefit market participants and the OSC. For example, technology solutions that assist firms in onboarding clients, including digital identity, fulfilling Know-Your-Client obligations and conducting suitability assessments would reduce the regulatory burden (potentially duplicative efforts and resources being expended). SupTech solutions may help to improve the OSC's regulatory oversight and enforcement, as well as enhancing investor protection.

These RegTech tools may later be accessible to other businesses outside of FinTech.

The recommended services could be expanded so that all businesses, regardless of sector affiliation, can take advantage of the added support

51. OSC to consider how an open data framework could be applied to Ontario's capital markets

Advancements in technology have not only assisted businesses to operate more efficiently and seek new and innovative business models, but also enabled the distribution, collection and sharing of data globally and instantaneously. Open data is defined as structured data that is machine-readable, freely shared, used and built on. Data governance standards are required to maintain the integrity and confidentiality of data. One of the primary benefits of open data is its support and alignment with fostering innovation and building technology solutions. Many FinTech solutions require open data to create efficiencies and offer better technology solutions for businesses and services to customers/investors.

In July 2020, it was announced that 31 financial services organizations joined in participating in the launch of the Financial Data Exchange (FDX) in Canada, including banks and credit card companies. These organizations are committed to working together to develop a secure, common, interoperable, flexible and royalty-free industry standard for financial data sharing.⁵³

Through the consultations, stakeholders agreed with the importance of having data and the role it plays in fostering innovation, but suggested further study is required to develop an open data framework.

Recommendation:

Other global jurisdictions, including the U.K. and E.U., mandate open data to increase competition and promote alternatives to consumers giving them choice, while other jurisdictions, such as Japan, India and Singapore, have promoted data-sharing arrangements. Data sharing is also consistent with privacy principles generally accepted in developed countries that data belongs to the client and not the institution gathering the data.

Given the complexity of open data, the OSC should work with capital market participants and federal regulators to consider developing an open data framework outlining details including, but not limited to, the scope of open data, data protection, and the level of industry participation.

Data sharing arrangements can then be further encouraged and facilitate more FinTech solutions for businesses (thereby reducing costs and minimizing duplication of processes) and investors. Greater accessibility to data would assist businesses in providing new products/services and long-term solutions to support innovative business models, but it must be done while key concerns, such as data protection, privacy standards, and investor protection, are not compromised.

Any appropriate safeguards must be put in place to ensure privacy concerns are addressed during the implementation phase. The development of an open data framework should also consider any existing and new national and provincial open data initiatives.

An area of consideration may be to create a test environment with synthetic data, similar to the approach currently being undertaken by the FCA in the U.K. As part of the FCA's DataSprint, the FCA collaborated with over 120 participants, including organizations, researchers and data scientists, to create a synthetic ecosystem of financial data that produced reference data for millions of synthetic individuals and businesses, including investor profiles and transaction data. The synthetic data will be made available in a Digital Sandbox Pilot for participants to utilize the financial datasets and develop products and solutions that would benefit the U.K. financial services industry.

⁵³ Financial Data Exchange. (2020, July 29). Leading Canadian financial services firms moving to adopt the FDX technical standards for secure financial data sharing. https://financialdataexchange.org/FDX/News/Press-Releases/FDX_Canada.aspx

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

The COVID-19 pandemic has reinforced the importance of capital formation for start-ups and entrepreneurs in ensuring a sustainable economic growth. Formal angel investor groups or networks may be viewed as “investment clubs” for accredited investors. They attract quality earlier-stage issuers for investment consideration, professionalize and share due diligence, share domain knowledge and assist in reducing the cost of capital. Angel investor groups generally invest in a diversified portfolio of start-up businesses, where smaller investments are made by many investors, thereby mitigating risk.

Angel investors are not clients of their angel groups, as they make their decisions on an independent basis, and they provide scarce early-stage funding and mentorship to entrepreneurs. Certain angel groups seek to be structured to earn a fee from working with their members to collaboratively finance these start-ups, which may, in certain circumstances, trigger registration under the traditional concept of registration.

Through the consultations, stakeholders were supportive of additional capital-raising opportunities for start-ups and entrepreneurs and some agreed with providing relief from registration requirements, subject to conditions.

Recommendation:

The Taskforce recommends that the OSC modernize the rules to support early-stage financing of start-ups that can be undertaken by angel groups to assist with capital formation. Amendments to the current registration requirements would enable angel groups to work with their “accredited investor” members to encourage investments in early-stage issuers. To prevent any circumvention of registration requirements, in the short term, the OSC could consider providing blanket order relief or discretionary relief to angel groups that meet certain specific criteria.

As suggested by stakeholders, key criteria could include but not be limited to the following:

- The angel organization must be a not-for-profit organization;
- The angel organization must limit its membership to accredited investors;
- No promotion of any investment takes place;
- No advice is given on the suitability of any investment opportunities and no activity akin to advising activity is provided to investors;
- Fees collected by the angel organization are limited to reasonable membership fees for the ongoing operational expenses of the angel organization; and
- The angel organization cannot hold, handle or have access to investor funds or securities.

This recommendation recognizes that angel networks may be able to help bridge financing gaps that early-stage businesses face.

53. The CSA should conduct its planned consultation on the regulatory framework concerning the distribution of and access to equities market data and initiate a consultation around other impediments to an efficient and competitive exchange environment

The capital markets have evolved over time, from a structure in which trading in a particular security was concentrated on a single listing exchange to one in which multiple marketplaces compete for trading in the same securities and the exchanges compete for listings. This has meant that having access to real-time equities market data from multiple marketplaces is a necessity to both trade effectively and service investors appropriately. However, costs associated with access to and use of that data have escalated due to the increased number of marketplaces charging for data, the variety of data fees charged and the lack of an oversight mechanism to bring the cost of real-time consolidated market data to a reasonable level.

This has led nearly all Canadian dealers to only provide real-time market data of the listing exchange to their investment advisors and self-directed retail investors. Proprietary traders and institutional investors, on the other hand typically have access to real-time consolidated market data. In addition, proprietary traders with multiple trading systems are often charged multiple times for access to the same exchange data.

Many stakeholders have raised concerns fact that a large number of Canadian investors have no access to real-time consolidated equities market data, including fairness (i.e., is real-time market data available to all on a fair and consistent basis), quality of execution (i.e., many dealers post limit orders on the listing exchange so that their clients are able to see them — which hinders exchange competition), and transparency of volume traded (i.e., the ability for investors to see the full liquidity and activity of a security or ETF).

Most market participants argue that the consolidated fees charged by marketplaces for data are too high, while a few take the position that the value of the data has increased because of changes to the business models of intermediary firms, such that the fees charged are warranted.

In the U.S., the Securities and Exchange Commission enforces display requirements whereby all investors have access to real-time consolidated equities market data and works with equities marketplaces on appropriate pricing and revenue allocation models. Other global regulators (such as the European securities regulators and the International Organization of Securities Commissions) are examining issues regarding access to market data, including fairness, value and fees.

Stakeholders noted other impediments to an efficient and competitive Canadian marketplace, including issues around market close auctions and national indices being calculated using only listing market data.

Recommendation:

The CSA's approach is to examine the issues relating to equities market data by:

- Assessing the changes in market data use and costs since the introduction of marketplace competition;
- Assessing whether the current regulatory requirements that contribute to the need to use market data continue to be appropriate; and
- Assessing whether the current model for consolidated market data in Canada, including the role of the information processor continues to be appropriate.

The Taskforce notes that the CSA through the OSC has already commenced a review of these issues, including through informal consultation with industry stakeholders.

The Taskforce recommends that the CSA complete its review and undertake a formal public consultation on the regulatory framework concerning the model for the distribution of and access to equities market data, with a particular focus on:

- A model of market data availability that promotes fair, cost-effective access to individual marketplace and consolidated information;
- The availability of timely consolidated data at a reasonable cost, especially for investment advisors and retail investors; and
- Access that promotes fair competition among marketplaces and users and looks to reduce barriers to competition among exchanges.

The Taskforce acknowledges that the issues associated with access to market data and the possible resolutions are dependent on local regulatory requirements, including models of consolidation, and the business models of the market data users. However, addressing these issues is key to instilling confidence in Ontario's capital markets. Further consultation of stakeholders that would inform potential changes to the regulatory framework will ensure a fairer and more efficient model for the provision of market data. An increased availability of consolidated market data at the right cost may enhance investor protection and reduce costs for all intermediaries. The recommendation is critical to leveling the playing field between retail and professional investors.

54. OSC to conduct a review of the impacts of marketplace outages

There have been a number of issues highlighted in recent years relating to marketplace outages. One key issue relates to the ability of trading to migrate to other marketplaces. This trading network redundancy is important for a variety of reasons, including facilitating ongoing price discovery and ensuring that all market participants, including retail investors, can continue to have uninterrupted access to Canadian capital markets.⁵⁴

However, in the event of a marketplace outage, this migration of trading does not always occur as anticipated and the option to execute orders elsewhere may not always be available for all market participants. This issue may be particularly acute for retail investors and retail investment advisors. There may be a variety of reasons why trading does not efficiently migrate to other marketplaces including, but not limited to, access to market data from all marketplaces, lack of cancel messages from the affected exchange, availability of certain order types only on some marketplaces, and operational and risk management issues.

Another issue relates to the impact on the closing price of a security where there is an outage of the listing marketplace. This is particularly important where the market-on-close facility does not operate at the end of the day and the closing price of a security is not determined. In the past, the alternative used has been the last sale price of the security on the listing marketplace. However, as there are multiple marketplaces, this is not an optimal solution.

Recommendation:

In light of these concerns, the Taskforce recommends that the OSC undertake a review of the impacts of marketplace outages, including the impediments that challenge the immediate movement of trading between marketplaces and the effect of the outages on the closing price for securities. The Taskforce recommends significant focus be placed on the impact to retail investors resulting from marketplace outages and resolving the impediments to retail orders being migrated to other exchanges.

⁵⁴ NEO Exchange. (2018, April 30). Friday April 27, 2018 TMX outage: A wake-up call for Canadian capital markets and our regulators. <https://www.aequitasneo.com/en/views/friday-april-27-2018-tmx-outage-a-wake-up-call-for-canadian-capital-markets-and-our-regulators>

2.6 Modernizing Enforcement and Enhancing Investor Protection

The role of regulators is not limited to policing. However, the OSC's role in ensuring that market participants comply with securities laws aimed to protect investors is essential to instilling confidence in the capital markets and attract investment. The role of enforcement in a modern and effective regulator must ensure that investigations are conducted in a manner that does not place an undue burden on market participants.

The Taskforce heard in the consultation the importance of making it easier for harmed investors to obtain compensation when justified.

To achieve these objectives, the Taskforce proposes a range of recommendations to modernize enforcement and enhance investor protection. New and modern offences are needed to reflect market realities, including to prevent misleading statements being made about public companies. More modern investigative tools are essential to facilitate the OSC's quasi-criminal investigations by giving provincial judges the power to issue production orders. The maximum monetary penalties which have not been increased since 2003, leaving Ontario out of step with global peers in the ability to levy meaningful fines. The collection powers of the OSC are sometimes unable to ensure that convicted bad actors pay back their ill-gotten gains. The Taskforce proposes recommendations that seek to address these concerns. The expansion of regulatory scope and tools must be balanced appropriately to ensure market participants who engage in good faith with the investigative process must have a reasonable and transparent path to raise issues as part of the OSC's investigations.

Enhancements are also needed for investor protection, including by designating a dispute resolution services organization that would have binding decision-making power to provide harmed investors an efficient and cost-effective way to obtain compensation where appropriate.

These recommendations would collectively instill greater confidence in Ontario's capital markets, thereby attracting more investments and spurring greater economic growth.

Modernizing Enforcement

55. Provide the OSC with more effective powers to freeze, seize or otherwise preserve property, including property transferred to family members or third parties below fair market value

Collecting monetary sanctions (administrative penalties, disgorgement, costs and voluntary payments agreed to under the terms of a settlement) continues to be challenging for all regulators including the OSC, especially where the company or individual sanctioned is not a market participant. In fiscal year 2019–20, for the monetary sanctions resulting from settlements and contested hearings ordered during the year, the OSC had an average collection rate of 94.6 per cent, with 0 per cent collected from non-market participants in contested hearings.⁵⁵ A common tactic used by those who commit fraud or those trying to avoid payment of amounts ordered is to shield their assets from recovery by the OSC by inappropriately transferring them to friends and family at a price below fair market value.

Recommendation:

To improve collections, the Taskforce recommends the following which is based on recent amendments to the British Columbia *Securities Act*:

1. Enhanced OSC Freeze Powers

Currently, when applying to the Superior Court to continue the application of a freeze direction issued by the OSC, the OSC must establish some evidence that frozen funds or property were obtained through a breach of Ontario securities law by the target of an investigation.

The Taskforce recommends that the OSC also be permitted, subject to the same authorization and oversight by the Superior Court as exists currently for freeze directions, to freeze any assets, starting at the investigation stage, by establishing that the assets are being preserved in order to possibly return money to investors who may have been harmed and/or to deprive a respondent of ill-gotten gains through a disgorgement order. This expanded freeze order power would apply in cases where there is any misconduct that is intentional, dishonest or involves investor harm, including breaches of s. 25 (trading without registration), s. 53 (distribution of securities without a receipted prospectus), s. 76 (insider trading and tipping) and s. 126.1(1) (fraud and market manipulation).

2. Power to Seize Assets Transferred Below Market Value

The Taskforce also recommends giving the OSC the clear power to freeze and seize assets that were transferred below fair market value to family or third parties using the tests for continuing a freeze direction that currently exist, as well as the alternative conditions outlined above; and providing the OSC with expanded powers to investigate transfers of property to, or receipt of property from, family or third parties. This power would cover transfers to family that could have occurred before the misconduct at issue in the investigation had begun, and transfers to third parties that may have occurred on or after the misconduct at issue had begun. Certain transfers to third parties or family

⁵⁵ Ontario Securities Commission. (2020, June). Management's discussion and analysis of the OSC's financial performance for the fiscal year ended March 31, 2020. https://www.osc.gov.on.ca/documents/en/Publications/Publications_rpt_2020_osc-md-and-a_en.pdf

members below fair market value may be excluded, such as transfers made for legitimate tax or estate planning purposes.

3. Power to Dispose of Frozen Assets to Retain Value

In addition, the OSC would, subject to obtaining a Court order, have the power to dispose of frozen assets to retain value where there is a risk of the asset or property losing value. This could happen prior to a hearing and any potential monetary sanctions being ordered. The Court's role would be essential to ensure that this extraordinary remedy would be used in a way that achieves fairness.

4. Joint and Several Liability

The Taskforce also recommends that the OSC be permitted to seek an order from the Court that the third parties or family members who received a below market value benefit as a result of the transfer, be made jointly and severally liable with the respondent to pay the lesser of: (a) disgorgement amounts ordered by the Commission or by the Court or (b) the below market value benefit received. Third parties could have a potential defence if, at the time of transfer, they could prove they were dealing at arm's length with the respondent.

5. Role of Tribunal Under the New Governance Structure

Under the new OSC governance structure, the original *ex parte* freeze direction and hearings of any requests for clarification, variation or revocation in respect of the direction would be heard in front of the OSC tribunal (as is currently the case for OSC freeze directions that are heard in front of the Commission). The OSC's exercise of its freeze and seizure powers would continue to be contingent on a Court extending the freeze or seize direction, or making its own order, after the initial direction by the Tribunal.

56. Limit access to drivers' licences and licence plates for failure to pay amounts ordered by the OSC or the Courts

A challenge with collections is that the OSC has limited tools to incentivize payment of monetary sanctions. In Ontario, the province could limit a person's access to a driver's licence or licence plates because the individual did not pay amounts owing in certain circumstances. For example, unpaid highway tolls or penalties under the *Highway Traffic Act*, unpaid support orders, as well as unpaid taxes or conviction of certain offences relating to unauthorized delivery, distribution or transportation of tobacco products.

Recommendation:

The Taskforce recommends that Ontario not issue or renew a driver's licence or licence plates to individuals who have failed to pay the administrative penalties, disgorgement or costs ordered by the OSC, or fines, or restitution or compensation ordered by the Court. As many individuals drive, this proposal is aimed at incentivizing payment and increasing the OSC's sanction collection rates. This recommendation is based on recent amendments to the British Columbia *Securities Act*.

The implementation of this recommendation requires careful consideration of privacy safeguards that may be appropriate to put in place with respect to information sharing and will require coordination between the OSC and the Ministry of Transportation, including information sharing with respect to the names, addresses, driver's licence numbers, vehicle information, etc. As this is a collections-related measure, the sharing of compelled information would be permitted under the proposed exemption discussed in Recommendation 63 above.

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

There have been cases where a series of unsubstantiated statements are made publicly for financial gain, and misleading or false information is introduced into the market to intentionally or recklessly affect the share price of public companies and influence the investment decisions of investors. Such schemes are sometimes referred to as "short and distort" campaigns (where there is profit from falling share prices) or as "pump and dump" schemes (where there is profit from increasing or inflated share prices).

The advent of technology in recent years, including for example the use of social media, has changed the nature and tactics of these schemes. In addition to accessing a much wider audience, campaigns can be sustained with many misleading or false statements made over a prolonged period. British Columbia recently enacted legislation that will help combat such abusive schemes. Many commenters indicated support for this recommendation.

Recommendation:

The Taskforce recommends creating a new and specific prohibition on making misleading or untrue statements about public companies. This will make it easier for the OSC to effectively deter and combat abusive practices intended to affect share prices or influence investor decisions, such as "short and distort" campaigns and "pump and dump" schemes. The prohibition would also cover

attempts to make “misleading or untrue statements about public companies” to address the abusive practices that may not be successful, but which are still egregious.

The prohibition would allow the OSC to take enforcement action targeting any person or entity who makes one or more statements about a public company, where those statements are known to be (or there is a reckless disregard for whether these statements are) misleading or untrue, and when those statements, taken on their own or together, would be expected to either affect the market price or value of the securities of the public company or derivatives based on such securities, or influence the investment decision-making of a reasonable investor in respect of these securities or derivatives.

To enforce the prohibition, the OSC would not need to prove that the market was distorted by the statement or statements (i.e., there would be no causation requirement). An intention to impact the market or influence a reasonable investor’s decision-making would be sufficient. This prohibition is not meant to capture analysts who frequently provide their researched views on reporting issuers’ securities, and who may omit facts without the intent to mislead. It is also not meant to stifle the legitimate dissemination of public information by analysts or reputable activist short sellers. Indeed, the Taskforce acknowledges that reputable activist short sellers’ public comments can be important for price correction of a public issuer’s securities.

58. Increase the maximum for administrative monetary penalties to \$5 million and increase the maximum fine for offences to \$10 million

After holding a hearing, among other monetary sanctions including disgorgement and costs orders, the OSC can order a person or company who has not complied with Ontario securities law to pay an administrative penalty of not more than \$1 million for each failure to comply. The amount has not been increased since 2003.

Certain sizable registered firms or other very large entities would not be deterred by a \$1 million sanction because, for example, \$1 million could be an acceptable cost of doing business for such firms.

After holding a trial, in addition to imprisonment and fines, provincial Courts can order a person or company who has contravened Ontario securities law to pay a fine for quasi-criminal offences of not more than \$5 million. This fine has not been increased since 2003.

Recommendation:

The Taskforce recommends increasing the maximum administrative penalty to \$5 million to modernize securities legislation by adjusting for inflation and scale of Ontario business, aligning with similar SRO sanctions for similar breaches, and more effectively deterring misconduct for larger firms or more egregious conduct.

The administrative monetary penalties and certain other amounts collected by the OSC, as set out in the *Securities Act*, could be allocated to third parties or used by the OSC for certain specific purposes.

The Taskforce recommends that the OSC work with the Ministry of Finance to examine potentially expanding the uses of these “designated funds” to support OSC’s regulation of capital markets in accordance with its mandate.

The Taskforce also recommends increasing the maximum fine for quasi-criminal offences to \$10 million. This would bring the maximum fine closer to the maximum quasi-criminal fine proposed under CCMR in the draft Capital Markets Stability Act of \$25 million which aligns with the similar US\$25 million maximum criminal penalty in the United States under the Securities Exchange Act of 1934. In the United Kingdom, there is no monetary limit, while the maximum criminal monetary penalty in Australia is AU\$11.1 million.

59. Modernize investigative tools by empowering the provincial Court to issue capital markets production orders

To enhance investor protection, the OSC’s quasi-criminal investigative teams need modern tools to obtain necessary documents and data to combat white collar crime and other breaches of Ontario securities law.

Currently, judicial search authorizations (i.e., search warrants) are one of the few available tools for enforcement investigators to bring serious capital markets offenders to justice in the criminal Courts. However, judicial search provisions available to OSC investigators do not contemplate evidence being stored using modern technology.

Modern financial crime has evolved beyond the scope of the search warrant power created by *the Provincial Offences Act*, which dates from the era of paper recordkeeping. The *Provincial Offences Act* search warrant power only conveys a power to search for “things” such as paper records and objects. Therefore, to search for data within computer systems it is necessary for enforcement investigators to take the invasive, disruptive and often impractical step of entering premises and searching computers on site or seizing the machines themselves. A production order requires the record holder to gather or prepare the records, even if they are in off-site paper or electronic storage, and provide them to the investigators, within a certain period of time specified by the Court (typically 30 days but it can be extended by the Court, if appropriate).

OSC Enforcement Staff require investigative tools that are effective in the modern digital age. Production orders are far less intrusive to the ongoing business of the capital markets than search warrants because they do not require enforcement investigators to enter premises or seize essential equipment, and they provide a reasonable schedule for compliance with the direction of the Court to produce evidence. The use of modern technology such as cellphones, electronic banking, instant messaging apps, etc. is now commonplace and data from this technology is the primary source of evidence in every quasi-criminal investigation under the *Securities Act*. British Columbia recently enacted legislation that will help address these investigation challenges.

Many commenters supported modernizing the OSC's investigative tools to the extent it was necessary. In the Taskforce's Consultation Report, the Taskforce had proposed another investigative tool that would have provided enhanced compulsion powers to the OSC under s. 13 of the *Securities Act*. In response to commenters' feedback, the Taskforce does not recommend implementing that other proposal at this time.

Recommendation:

The Taskforce recommends that judges or justices of the provincial Court should have the power to issue production orders to require firms and individuals that are not under investigation, and who have possession or control of the relevant information or data, to gather or prepare the applicable documents, records, or electronic data to deliver to an authorized enforcement investigator. This recommendation is based on similar provisions in the *Criminal Code of Canada* and amendments enacted recently under the British Columbia *Securities Act*.

Judicial production orders are necessary because the current judicial search authorization powers are increasingly ill-suited to obtaining the evidence of electronic transactions, electronic messages and cellular communications that are the key technology utilized in modern financial crime.

The use of production orders in quasi-criminal investigations is necessary to modernize investigative tools given that information is no longer stored predominantly in paper format in specific office locations. Having production order powers available in the securities context would align the quasi-criminal investigative tools available to enforcement investigators with those used in *Criminal Code* investigations. Production orders (like search warrants) must be approved by judicial authority and cannot be approved by the OSC tribunal. A person or company served with a production order (i.e., a person or company not under investigation by the OSC) is under a legal obligation to produce a required document. Information produced pursuant to production orders cannot be used against the person producing the documents, unless the person falsified the documents or misled or lied to the OSC when producing the documents.

60. Amend legislation to permit substituted and broader service provisions and remove the search exemption for private residences such that they can be searched during daylight hours with a warrant

Under s. 163 of the regulations to the *Securities Act*, summonses issued pursuant to s. 13 of the *Securities Act* are required to be personally served. However, personal service alone is an outdated requirement that does not account for acceptable alternatives, particularly where an individual attempt to evade service or where, in the case of electronic service, evidence of receipt can be shown. The ongoing COVID-19 pandemic has also highlighted the need for reasonable alternatives to the outdated personal service only requirement. As an example, process server firms ceased in-person business operations because of pandemic-related restrictions. This caused complications and delays in the OSC's ability to formally serve and enforce summonses and protect the integrity of the capital markets.

Also, the OSC does not have the authority under s. 13(4) of the *Securities Act* to apply to a judge of the Ontario Court of Justice for an order authorizing a search of a private residence (s. 13(9) of the *Securities Act* expressly excludes the power to search private residences).

Recommendation:

In order to modernize OSC enforcement, the Taskforce recommends changes to the service provisions and the search of private residences.

1. Permit Substituted and Broader Service Provisions

To increase the flexibility of the service of summonses, the Taskforce recommends legislative amendments to revoke the personal service requirement and instead allow for summonses to be served by:

- Personal or electronic delivery (with a requirement that electronic delivery only constitutes legal service if it is confirmed by the recipient or other evidence of receipt can be shown);
- Leaving the summons at a subject's last or usual residence with an occupant who is at least 16 years old;
- Permitting the OSC to make a substituted service order if the subject is evading service or if the last or usual address of the subject cannot be found or is unoccupied;
- Delivering to places of businesses; or
- The use of courier or registered mail.

Safeguards such as an affidavit of service and specific requirements for email transmission and acceptance should be considered as part of the legislative amendments. These measures would provide OSC Enforcement Staff with more flexibility to effect service on individuals. Modernizing securities legislation in this way would align it with s. 26 of the *Provincial Offences Act*, the OSC Rules of Procedure and Forms for Commission hearings and the new provisions in British Columbia.

2. Allowing Search Orders of Private Residences with a Warrant

The Taskforce recommends allowing a search order to be issued by a judge of the Ontario Court of Justice for the search of a private residence during daylight hours such as between 6:00 A.M. and 9:00 P.M. A search order could be issued by a judge of the Ontario Court of Justice if the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that:

- The place or dwelling-house is a place referred to in the order authorizing a search; and
- The entry to the place or dwelling-house is necessary for the purpose of investigating under securities legislation.

This would result in more flexibility for the OSC's Enforcement Branch to apply for private residence search orders, which is already permitted in some other Canadian jurisdictions including British Columbia, New Brunswick and Newfoundland and Labrador. It would also be consistent with the approach taken under the proposed draft legislation under CCMR.

61. Codify certain OSC requirements relating to data delivery standards to ensure the preservation of evidence and address assertions of privilege

Currently, there is no standardized approach in how respondents are expected to deliver documents, including electronic documents or data to the OSC. OSC Enforcement Staff are receiving increasingly data-intensive productions in different electronic formats, which has exacerbated the problem. The lack of a standardized approach also results in summons recipients, often companies, needing to expend substantial time, resources and cost to ensure an appropriate document delivery to the OSC.

Recommendation:

As mentioned above, the Taskforce supports OSC Enforcement Staff publishing public Document Delivery Standards Guidance that would outline how, and in what format, summons recipients are expected to deliver documents to the OSC. The Taskforce recommends two corollary statutory amendments that would benefit the efficacy of this guidance.

1. Ensuring the Preservation of Evidence

The Taskforce recommends an express statutory provision that allows OSC Enforcement Staff to require summons recipients to preserve evidence. While the Taskforce understands that OSC Enforcement Staff regularly request or direct summons recipients to safeguard documents and records in their possession or control, these requests and demands would not be enforceable themselves.

A robust regulatory tool aimed at ensuring evidence is not (inadvertently or wilfully) destroyed or altered and permitting regulatory action if it is destroyed or altered in the face of a requirement to preserve, would support the proposed guidance and the integrity of OSC Enforcement Branch investigations. This recommendation would harmonize the enforcement tools of the OSC with those in Alberta and those contemplated in the draft legislation under CCMR.

2. Addressing Assertions of Privilege

The Taskforce recommends that the enabling provisions in securities legislation be amended to give the OSC the power to make future rules, if necessary, on the process for addressing assertions of privilege in prosecutions and investigations and resolving challenges to such assertions. Such proposed rules would be subject to the usual public comment and ministerial approval process, and would ensure that the processes and procedures align, for example, with current (and future) requirements of the common law or Law Society of Ontario guidelines on dealing with privilege. Larger or more complex investigations often require significant documentary productions from summons recipients and assertions of privilege arise.

Without this enabling amendment, the OSC would be limited in its ability to address these issues if needed. Clear expectations in privilege-related matters can create efficiencies for investigations as well as provide clarity and consistency for summons recipients without abrogating privilege in any way. An OSC rule could address practical considerations that provide for a reasonable progression of an investigation that limits undue delay, while respecting each party's right to make properly founded assertions of privilege.

62. Provide that, once a finding of wrongdoing has been made, any disgorgement amount owing to the OSC forms a lien that the OSC may register over the entire property of the persons named in the OSC order

Currently, under existing securities legislation, the OSC is only considered to be an unsecured judgement creditor and therefore ranks below other secured creditors and its debts have no priority status. Any disgorgement amounts collected by the OSC would be used to provide redress to harmed investors.

Recommendation:

The Taskforce recommends an amendment to add a provision that the OSC may register a lien for any disgorgement amount owing to the OSC, which would form a charge over the entire property of the persons named in an order, including over property in the hands of a receiver, or a trustee. By adding such a provision, the OSC would have priority over all other claims other than prior registered security interests and certain statutory claims.

This amendment would put the OSC in better standing to collect monetary sanctions and enforce its orders, thereby enhancing investor protection. However, the OSC should have the option to waive its charge or lien, particularly where there is property held by a receiver for the benefit of investors.

63. Allow tolling agreements to enable the OSC and respondents to mutually agree to extend the limitation period to commence proceedings, and expand the limitation period for collections-related actions

A tolling agreement is a written agreement, signed by both parties in litigation proceedings, that suspends the statute of limitations for an agreed amount of time. With the limitations period suspended, the parties can have the time they need to respond to document requests, negotiate, and settle disputes. However, currently the OSC loses its jurisdiction to commence a proceeding when the six-year limitation period in the *Securities Act* runs out.

A challenge of collecting monetary sanctions can be identifying assets in a timely manner. This is particularly difficult when respondents make efforts to hide assets or try to shield them to avoid payment of amounts ordered following an enforcement proceeding (for example, transfers below market value to family members could potentially have occurred before the misconduct at issue in the investigation had begun). It can also be the case that there is a significant passage of time between the wrongdoing, the investigation, the hearing and any appeals, and the collections actions being taken. The OSC may face legal challenges on their ability to take collections actions based on the passage of that time. This negatively impacts the OSC's ability to collect monetary penalties and creates potential loopholes for respondents to avoid payment of amounts ordered.

Recommendation:

The Taskforce recommends permitting the OSC and respondents the ability to mutually agree to extend the limitation period to commence proceedings. This amendment would preserve the OSC's right to prosecute while permitting respondents additional time to engage with OSC Enforcement Staff and explore settlement.

Furthermore, the Taskforce recommends that the limitation period for collections-related actions be expanded and clarified such that the limitation period starts from the date of the sanction order. For collections relating to real property, the limitation period would continue to be governed by the *Real Property Limitations Act* (which has a ten-year limitation period) from the date a sanction order is imposed. For collections relating to money and chattels, the limitation period would be ten years from the date a sanction order is imposed. Collecting monetary sanctions is important from both a deterrent perspective and for investor protection.

The Taskforce recognizes that there is a passage of time inherent in the investigation and litigation processes, in addition to issues with assets being hidden intentionally. All these factors may delay efforts to recover amounts owing under OSC orders. It is important that legal challenges based on limitation periods not be a viable avenue to avoid those monetary obligations. Commenters were supportive of actions directed at holding respondents accountable. This recommendation would help the OSC in pursuing civil claims, such as fraudulent conveyance proceedings.

Additionally, to streamline information sharing in order to facilitate collections, the Taskforce recommends amending the confidentiality requirements in securities legislation to avoid unnecessary applications to share compelled information (information that was compelled from the target of an investigation who was later sanctioned) for all collections-related matters. This would assist in the OSC's participation in programs facilitating collections, such as its existing participation in the CRA Set Off Program.

64. Strengthen investigative tools by empowering the OSC to obtain orders to block or remove websites and social media sites

The internet and social media are rapidly changing how financial products are marketed and distributed. Although the use of the internet has created new opportunities for domestic and cross-border distribution of financial products, it has also resulted in a rapid surge in online scams, which threatens to harm Ontario investors. Certain websites and social media sites distribute information to induce investors to invest in fraudulent schemes. Traditional enforcement powers designed for a pre-internet and pre-social media age limit the OSC's ability to quickly and efficiently block or remove websites or social media posts that are believed to be breaching Ontario securities law and harming Ontario investors. In some cases, current tools such as investor warnings and alerts issued by the OSC will not necessarily reach the intended audience and may not be as effective in preventing harm to investors.

Recommendation:

The Taskforce recommends giving the OSC additional tools to disrupt individuals or entities who appear to be breaching securities law, including engaging in potentially fraudulent conduct online. Specifically, similar to the current process for freeze directions, the Taskforce is recommending a statutory amendment giving the OSC tribunal the ability to direct a person or company to remove or block a website or its content where there is evidence of a breach of, contravention of, or non-compliance with securities law. These orders would have to be continued by the Superior Court of Justice on notice to affected parties. A person or company affected by these orders would have a right to a hearing in front of the OSC tribunal to request a clarification, variation or revocation of these orders.

The Taskforce expects this amendment would permit the OSC to more quickly and efficiently intercede to prevent harm to Ontario investors. The orders ultimately imposed by the Court are expected to assist website and social media site providers to take down these problematic sites while mitigating their potential liability.

65. Confirm that persons or companies who comply with a summons will not be in breach of any contracts they are a party to and that compliance with an OSC summons will not be a basis of contractual liability against them by third parties

Stakeholders recently raised concerns that a statutory amendment should be made to clarify that a summons recipient can comply with an OSC summons without breaching a contractual “non-disclosure agreement” or other contractual commitment to which they are subject. This amendment would be consistent with the common law that a contract which purports to restrict someone from compliance with a legal obligation is void, and it would affirm the law enforcement goals of a summons and its priority over private contractual commitments that may otherwise create legal risks to summons recipients if they comply with an OSC summons.

Recommendation:

The Taskforce recommends clarifying the scope of protection provided to persons complying with a summons. Specifically, compliance with an OSC summons would not be a basis of contractual liability against them by third parties, including for any breach of contracts that arise from the compliance.

This provision is expected to benefit both individuals and companies who are subject to summonses by providing comfort that they can freely provide information to the OSC in an investigation without concern that they may be in a breach of a contractual arrangement with a third party or may open themselves up to potential contractual liability for complying with a summons. This amendment is expected to equally benefit the OSC as certainty around this provision would permit OSC investigations to move forward more efficiently without summons recipients having to consider or address potential contractual obligations or liability.

66. Create prohibitions to effectively prosecute those who facilitate contraventions of Ontario securities law

When persons or companies are permitted to facilitate or assist others in the contravention of Ontario securities law, with impunity, it impairs confidence in the capital markets and the protection of investors. For example, someone who was willfully blind in selling fraudulent securities or who provided administrative support for a boiler room shares some responsibility in the commission of those offences.

Recommendation:

The Taskforce recommends a statutory amendment aligned with the language in the proposed draft legislation under CCMR and the recent amendments to the British Columbia *Securities Act*, which include prohibitions in respect of aiding, abetting, counselling or conspiring to contravene Ontario securities law. Such prohibitions would permit the prosecution of a person who counsels or otherwise assists another person or company to contravene Ontario securities law.

These prohibitions would harmonize and modernize the OSC’s enforcement tools and permit OSC Enforcement Staff to prosecute a greater breadth of securities law misconduct to increase protection of investors and instill confidence in Ontario’s capital markets.

67. Create a prohibition to prosecute front-running effectively

Market conduct rules and Ontario securities law prohibit abusive patterns of activity affecting the capital markets, including fraud, market manipulation, and insider trading (which, in respect of the latter, is based on a special relationship with an issuer). IIROC's UMIR addresses front-running by IIROC dealer members.

However, these rules are not broad enough and do not directly address the practice of front-running where a person or company, other than an IIROC dealer, misuses information they hold based on their relationship with a client or an investor with which they otherwise have a connection (a connected investor).

A prohibition on front-running would further enhance confidence in the integrity of the capital markets and reduce the potential for harm to clients, connected investors, other participants in the market and the capital markets as a whole. Front-running is comprised of two elements. The first entails having knowledge of an order of a client or connected investor, that if publicly disclosed, would impact the market price, to the disadvantage of that client or connected investor. The second entails acting on that knowledge other than in the interests of the client or connected investor with the order.

Recommendation:

The Taskforce recommends a statutory amendment aligned with the language in the proposed draft legislation under CCMR and IIROC's UMIR (as well as other Canadian securities legislation) that includes prohibitions on front-running (and related defences). Such prohibitions would permit the prosecution of a person or company that purchases or trades securities or derivatives ahead of their client or a connected investor with knowledge that the execution, placement, or disclosure of the client's or connected investor's intended trade or purchase could reasonably be expected to affect the market price of the security or derivative.

This prohibition would harmonize and modernize the OSC's enforcement tools and will permit OSC Enforcement Staff to prosecute a greater breadth of securities law misconduct in order to increase protection of investors and instill confidence in Ontario's capital markets.

68. Greater rights for persons or companies directly affected by an OSC investigation or examination and ensuring proportionality for responses to OSC investigations

The Taskforce heard from stakeholders that there is not a clear process for the adjudication of disagreements arising in the course of the OSC's investigations and examinations and that persons or companies subject to OSC summonses would benefit from more transparency about the entire investigative process. Furthermore, stakeholders advised that it is important that some limits apply to the responses to requests for information made during the OSC's investigations and examinations given the potential burden imposed by an OSC investigation.

Several commenters supported these proposals, including an amendment that would permit persons or companies directly affected by an investigation or summons to apply to the Commission for clarification.

However, other commenters highlighted concerns that such proposals could negatively impact the effectiveness and integrity of enforcement investigations, the ability of the OSC Enforcement Branch to bring timely enforcement action, and the OSC Enforcement Branch's capacity to exchange information with other securities regulators.

With the following recommendations, the Taskforce balanced concerns that ongoing and confidential enforcement investigations are not compromised or unduly delayed, with concerns that there needs to be additional processes for impacted parties to raise legitimate issues about the ambit and scope of an ongoing investigation. In that regard, the Taskforce encourages the OSC to routinely assess the efficacy and veracity of these additional measures.

Recommendation:

The Taskforce recommends that transparency and greater rights for persons or companies directly affected by an OSC investigation be achieved primarily by the publication of guidance, prepared by OSC Enforcement Staff in collaboration with certain stakeholders (which began in May 2019), on the investigative process (i.e., "Enforcement Investigation Guidance" and "Document Delivery Standards Guidance").

The goal of the Enforcement Investigation Guidance is to provide more transparency around the investigative process and consistency of approach. The Enforcement Investigation Guidance would provide an overview of OSC Enforcement Staff's practices during an investigation, and will address measures intended to facilitate cooperation and efficient investigations, including:

- Providing notice to persons or companies that have been the subject of an investigation when the investigation is being closed with no further action;
- Facilitating an examination by providing certain documents in advance to the persons served with a summons, where appropriate;
- Communicating with summons recipients or their counsel prior to sending a summons to discuss realistic timelines, production concerns, and address production options for voluminous, complex or novel requests; and
- Providing advanced notice to respondents before a public proceeding is initiated with an invitation to respond to the allegations the OSC intends to make.

This guidance would make the OSC's investigation practices more transparent, codify best practices, and result in clearer and earlier communication between the OSC and market participants on enforcement matters.

In respect of OSC Enforcement Staff communicating with summons recipients prior to issuing a summons, the outcomes of these discussions may include providing a subset of documents, accepting rolling productions, providing an order of priority for documents, considering a different format for production, extending a deadline for production, and exploring the option of creating a document production plan for complex or novel production requests.

Importantly, the Enforcement Investigation Guidance would also include a framework for escalating summons-related issues to the CEO of the OSC under the new structure (the Chair under the current structure), where such issues cannot otherwise be resolved within the OSC's Enforcement Branch. The Taskforce supports the CEO of the OSC under the new structure (the Chair under the current structure) requiring the OSC Enforcement Branch to issue additional guidance as needed to provide transparency concerning the use of, and experience with, this escalation process.

Additionally, following the creation of the new separate adjudicative tribunal (see Recommendation 4 above), the Taskforce recommends consideration be given by the Ministry of Finance, the OSC and the OSC Securities Proceedings Advisory Committee to whether there is a need for a mechanism for parties to escalate summons-related issues beyond the CEO potentially to the new separate adjudicative tribunal. This process could be similar to a court case management conference or proceed by way of an application seeking advice and directions. If such an escalation mechanism is implemented, the Taskforce recommends that the process be subject to costs awards and tight timelines in order to minimize the potential misuse of the process and concomitant delays in investigations.

Furthermore, the Taskforce also supports the OSC developing Document Delivery Standards Guidance to codify best practices, including how and in which formats to produce documents (although ultimate production decisions would still rest with the summons recipient). This guidance would acknowledge that there are several challenges that may warrant a nuanced consideration of production requests (particularly those that speak to timing, costs and complexity), and therefore will incorporate flexibility to tailor the approach to document production.

The OSC currently provides an Enforcement Notice (which sets out pertinent information about the contraventions that the OSC intends to allege and the basis for those allegations) before the Statement of Allegations is issued and the Notice of Hearing is published (which, together, initiate public proceedings). The Taskforce recommends that this Enforcement Notice be sent at least three weeks in advance of public proceedings being initiated, and that the Enforcement Notice procedures (to be set out in the Enforcement Investigation Guidance) include an invitation for respondents to respond to the allegations that the OSC intend to make (as is the case currently). Upon receiving an Enforcement Notice, a respondent would be able to provide mitigating details that may not have been uncovered in the course of the OSC's investigation or may wish to initiate settlement discussions.

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

Currently, in accordance with the *Securities Act*, a person or company shall not disclose the nature or content of an investigation or examination order or summons-related information except when the disclosure by a person or company is to:

- The person's or company's counsel; and
- The person's or company's insurer or insurance broker after meeting criteria set out in the *Securities Act*.

Some stakeholders have indicated that additional disclosure exemptions should be permitted to reduce the regulatory burden and time spent filing a formal application and participating in a hearing process when seeking permission to disclose. The majority of commenters indicated support for this recommendation, and several indicated that there should be a mechanism to restrict disclosure in appropriate circumstances.

Recommendation:

The Taskforce recommends incorporating additional confidentiality exceptions in securities legislation to permit disclosure under expanded circumstances. This should be done while preserving the appropriate balance between not interfering with OSC investigations and permitting the earlier involvement of, or notification to, all the appropriate parties in an investigation.

The Taskforce recommends adding exceptions in securities legislation to allow for disclosure of an investigation order, examination order or summons served by the OSC to a prudential financial regulatory authority, such as the Office of the Superintendent of Financial Institutions, and equivalent regulators, and to an expanded list of counsel that includes counsel for the person's employer where it would facilitate responses to investigation requests and summonses in the appropriate circumstances.

Under the new OSC governance structure, the Taskforce also recommends that the CEO or their delegate would have the power to make decisions to allow disclosure in cases where an exception does not apply, as most of these decisions are routine in nature. This would allow OSC staff to efficiently make decisions where appropriate allowing disclosure through an enhanced streamlined process, including an expedited process to amend investigation orders and/or summons to permit such disclosure. This would be used by OSC staff to allow disclosure, for example, where the disclosure is necessary to comply with requests from the OSC or for sound corporate governance, such as disclosure to a company's internal legal, compliance and governance officers, board of directors or senior management where such disclosure would not compromise the investigation.

70. Clarify that the OSC may not require production of privileged documentation

Under common law, respondents always have the right to not produce privileged documents, and the Supreme Court of Canada has made this a quasi-constitutional right. In practice, the OSC does not collect privileged information. Nonetheless, some stakeholders have noted that further clarification is necessary, such that privileged documents must not be required to be produced in any circumstance during OSC investigations or examinations.

Recommendation:

The Taskforce recommends a statutory amendment aligned with the language in the proposed draft legislation under CCMR that clarifies that nothing in that legislation is to be construed to affect the privilege that exists between a lawyer and his or her client in relation to information or records that are subject to that privilege. The Taskforce notes that respondents may opt to voluntarily share privileged information with the OSC.

On occasions where there is a challenge to the assertion of privilege, the Taskforce recommends that the OSC's proposed Document Delivery Standards guidance sets out the OSC's expectations for the production of a privilege log when an assertion of privilege is being made. This could include the date, author, recipient and nature of the document, and the specific basis for asserting privilege.

Enhancing Investor Protection

71. Provide the OSC with the authority to designate a dispute resolution services (DRS) organization that would have the power to issue binding decisions

Currently, registered firms in Ontario are required to take reasonable steps to ensure that the Ombudsman for Banking Services and Investments (OBSI) is made available to their clients as a DRS. After OBSI has investigated a complaint from a harmed investor, it conducts necessary analysis consistent with OBSI's loss calculation methodology and, where warranted, makes a recommendation for compensation.

However, because OBSI's recommendations are not binding, registered firms that have harmed retail investors sometimes refuse to follow OBSI's recommendations or offer settlements that fall below OBSI's recommendations. Furthermore, harmed investors could be induced to accept lesser settlements because of the likelihood they may receive nothing if OBSI's recommendations are ignored. In these circumstances, the harmed investors' only alternative is to resort to the courts, which may not be possible given the legal costs involved and the time it takes to pursue a civil action.

According to the OBSI Joint Regulators Committee Annual Report for 2019, clients received approximately \$1.04 million less than what OBSI recommended in 2018 and 2019; out of 316 cases that ended with monetary compensation, there were 23 cases (approximately 7 per cent), involving 15 firms, that were settled below OBSI recommendations.

In the Canada Financial Sector Assessment Program: Technical Note — Oversight of Securities Market and Derivatives Market Intermediaries (2019), the International Monetary Fund note that providing binding authority for OBSI would improve investor protection. There are several comparable jurisdictions that already provide a framework for investor redress through a binding ombudsperson scheme, notably those in the U.K. and Australia. Other jurisdictions such as the U.S. provide arbitration as a mechanism for securing redress for investors.

The \$350,000 limit on OBSI's compensation recommendations has not been increased since its inception in 1996.

In the Taskforce's public consultations, stakeholders expressed support for effective dispute resolution mechanisms that achieve favourable, fair and cost-effective outcomes for investors. If OBSI were given the power to issue binding decisions, stakeholders expressed a need to improve accountability, develop an effective internal appeals process and enhance OBSI's ability to deal with complex capital markets matters.

Recommendation:

One of the cornerstones of healthy capital markets is democratizing access to capital, while still protecting retail investors. A binding, reputable and efficient DRS framework in Ontario would be a significant improvement to the retail investor protection framework.

1. Give OSC the Power to Designate a DRS with Binding Decision Powers

The Taskforce recommends creating a statutory authorization that allows the OSC to designate a DRS that would have the power to issue binding decisions and for the OSC to establish the framework that would govern the DRS. The resulting framework will provide redress to harmed investors, in particular retail investors who have been harmed and lost an amount too low to consider a court action, would increase investor confidence in the capital markets by assuring that investors are compensated, when warranted, for financial losses that relate to the inappropriate trading or advising activity of a registered firm.

The framework would also require the DRS to have processes to provide procedural fairness for registered firms and investors and include a right of appeal to the OSC tribunal. To ensure the framework does not become unduly burdensome, the Taskforce recommends that an appeal of a DRS decision to be permitted only in limited circumstances such as when there is a question of law, or where the DRS failed to act in accordance with its policies and procedures, its mandate or the terms and conditions imposed as part of the oversight regime (see below). Parties to an appeal of a DRS decision would be the appellant and the DRS.

2. Selecting the Best DRS Approach for Ontario

Ontario needs to have a binding, reputable and efficient framework for dispute resolution that is accessible for retail investors and accepted by registrants. This would be achieved through the OSC pursuing one of these two options pursuant to the statutory authorization given to the OSC:

- Create a new DRS that is a made-in-Ontario system that would be given the power to issue binding decisions; or
- Improve OBSI by imposing requirements to further enhance OBSI's governance structure, public transparency, and professionalism, as a condition for being given the power to issue binding decisions.

The Taskforce recommends that the OSC be mandated to present a plan to the Minister within six months of this report for achieving one of these two options, with the aim of having any required enhanced governance measures in place by January 1, 2022, and the designation of binding authority to be granted subsequently.

For either option, the OSC would work to implement a comprehensive oversight regime for the DRS. Among other components, the oversight regime would include:

- Veto power on appointments of directors and the ombudsperson; and
- Requirement to obtain approval with regards to any material amendments to the DRS's by-laws, terms of reference, fees, or policies and procedures which may have implications on procedural fairness for registered firms or investors.

It is also critical that a DRS has the appropriate expertise and credibility from all relevant stakeholders. For example, to further bolster the designated DRS's expertise and credibility on exempt market issues, the designation of the DRS would be conditional upon the DRS:

- Having a tailored loss calculation methodology to deal with exempt market cases;
- Hiring investigators with exempt market experience;
- Working with the relevant industry association(s) to develop a training program on exempt market issues for its investigators; and
- Adding exempt market representation to its Board, having regard to the overall composition and size of the Board.

3. Limits for DRS Compensation Decisions

Under either option for a DRS in Ontario, the Taskforce recommends that the limit on the designated DRS's compensation decisions be \$500,000 initially with subsequent increases every two years based on a cost of living adjustment calculation.

72. Require, in cases where there is sufficient evidence to establish that investors suffered direct financial losses, that amounts collected by the OSC pursuant to disgorgement orders be distributed to harmed investors through a Court-supervised process

A statutory process to support the distribution of disgorged funds to harmed investors is critical for investor protection in Ontario. It is important that ill-gotten gains recovered through the OSC's collection efforts be distributed to the investors who were harmed, as investors may not be able to independently recover from the respondent. Recently, although it is not required to do so under the *Securities Act*, the OSC has used a Superior Court appointed receiver to distribute funds disgorged to the OSC in two cases. These cases allowed the OSC to utilize the expertise of a receiver in the context of a Court supervised process to return over \$6 million to investors who had been harmed by the misconduct of respondents.

Recommendation:

The Taskforce recommends requiring disgorgement order amounts collected by the OSC to be distributed to harmed investors through a Court-supervised process in cases where there is sufficient evidence to establish that investors suffered direct financial losses.

1. Description of Process

The process would be run by a Superior Court appointed receiver where significant funds are available for distribution. In circumstances where there are a small number of investors or funds, the Superior Court could appoint an OSC employee as administrator. There would be a publication requirement to communicate information to the public relating to potential distributions.

This model would apply to disgorgement amounts that are collected by the OSC only. It would not contemplate the distribution of administrative penalties or voluntary payments to investors, which would continue to be allocated to third parties or used for other purposes authorized in securities legislation.

The OSC, when implementing this recommendation, should develop criteria to use to determine when the appointment of a receiver would be sought, and how to communicate to the public information relating to potential distributions. It will be important to ensure that the receivership process is used in circumstances where it is efficient to do so (e.g., not for amounts that are too little or if the evidence is insufficient).

2. Streamline Information Sharing

The Taskforce recommends amending the confidentiality requirements in securities legislation, to avoid unnecessary applications to share compelled information (information that was compelled during an investigation) for information that is necessary to facilitate returning money to harmed investors. It would permit the OSC to share information such as investor lists with the receiver to facilitate a more efficient notice and claims process. This services to streamline information sharing to facilitate returning money to harmed investors.

73. **Provide for automatically reciprocating sanction orders, cease trade 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**

Most Canadian jurisdictions, other than Ontario, have regimes under which another Canadian securities regulator's sanction orders or settlement agreements automatically apply in the local province or territory rather than being subject to a hearing for the reciprocation of the order (automatic reciprocation). The amount of time and resources dedicated to "reciprocating" other Canadian authorities' orders and agreements is perceived as a waste of resources that results in unnecessary added OSC costs.

Similarly, streamlined reciprocation provisions have been enacted in most Canadian jurisdictions other than Ontario to allow securities regulators, within their discretion without holding a hearing, to reciprocate orders by Courts, foreign regulators, SROs and exchanges (streamlined reciprocation).

Through the public consultations, the Taskforce heard that there was widespread support from commenters for this proposal because it supports a unified, streamlined and consistent approach to enforcement of orders and settlements across the country and enhances investor protection.

Recommendation:

The Taskforce recommends providing for both automatic reciprocation and streamlined reciprocation to help ensure that respondents who have been sanctioned in other jurisdictions are kept out of Ontario's capital markets more promptly and efficiently than they are currently.

1. Automatic Reciprocation

The recommendation to automatically reciprocate sanction orders resulting from the contested hearings and settlements of other Canadian capital market regulators means that such orders would apply in Ontario as if they were made by the OSC, without a separate OSC order. The Taskforce does not recommend distinguishing between orders resulting from breaches of Ontario securities laws or conduct contrary to the public interest. Automatically reciprocated orders could, among other things, impose limitations on or suspension of registration, or limitations on being an officer or director of an issuer. Cease trade orders from other Canadian capital market regulators would also be automatically reciprocated.

2. Streamlined Reciprocation

With respect to orders by Courts relating to capital markets, foreign capital markets regulators, SROs and exchanges, the OSC tribunal under the new structure (or the Commission under the current structure) would be able to reciprocate them on a streamlined basis, and within their discretion without respondents being granted an opportunity to be heard. When contemplating making such an order that would reciprocate a decision made outside Canada, the OSC tribunal under the new structure (or the Commission under the current structure) would make an assessment when making a streamlined order and, if circumstances warrant, it would grant a respondent an opportunity to be heard.

3. In General

This recommendation is predicated on the idea that a fair hearing has already been provided, making an OSC hearing or an opportunity to be heard unnecessary. Reciprocated orders or settlements would not have automatic effect in Ontario unless the OSC has the power to make a similar order or settlement. Monetary sanctions or voluntary payments agreed to in a settlement would not be reciprocated. If an automatically reciprocated order is overturned, vacated, revoked or otherwise held to be of no effect in the originating Canadian jurisdiction, that order will cease to apply in Ontario.

This amendment would eliminate the need for firms or individuals sanctioned in another jurisdiction to participate in an additional hearing in Ontario that routinely imposes the same or similar sanctions.

4. Preserving Rights of Market Participants

As part of the recommended changes to reciprocity, the Taskforce recommends also implementing the following requirements to help preserve the rights of market participants. The OSC should:

- Publish all orders reciprocated by the OSC; and
- Provide a clarification right (in lieu of an appeal right) to the OSC tribunal (under the new structure, or the Commission under the current structure) for automatically reciprocated orders.

74. Explicit exemption from freedom of information disclosures for whistleblower-identifying Information

The OSC implemented a whistleblower program in 2016 to encourage individuals to report information on possible violations of Ontario securities law. The program has generated hundreds of tips, which allows the OSC to address serious misconduct sooner and better protect investors.

Protecting whistleblowers' identities is critical to encourage reporting to the OSC. Currently, information that would identify a whistleblower may be protected under exemptions in the *Freedom of Information and Protection of Privacy Act* (FIPPA), however, it is not guaranteed. Furthermore, the existing protections that may be available under FIPPA may not be readily apparent to a potential whistleblower.

Recommendation:

The Taskforce recommends a statutory amendment to provide an explicit protection from disclosure for information subject to a freedom of information request that would identify a whistleblower. This statutory provision would lead to enhanced investor protection by ensuring the full effectiveness of the OSC whistleblower program, as whistleblowers would be fully confident that their identity as a whistleblower would be kept confidential from any FIPPA request. This recommendation is based on similar statutory amendments enacted recently in Alberta. This recommendation is also consistent with the protection provided under U.S. federal law to whistleblowers who make disclosures to the Securities and Exchange Commission.

Appendix: Taskforce Members' Biographies

Walied Soliman, Taskforce Chair, Canadian Chair, Norton Rose Fulbright

Walied Soliman is the Canadian chair of Norton Rose Fulbright (NRF). He is also co-chair of NRF's Canadian special situations team, which encompasses Canada's leading hostile M&A, shareholder activism and complex reorganizations team. In addition, his practice focuses on mergers and acquisitions, restructurings, financings, corporate governance and structured products. Mr. Soliman was honoured as the 2019 Global Citizen Laureate by the United Nations Association in Canada. Key achievements include: in 2017, Mr. Soliman was the only lawyer recognized in the Globe and Mail's Report on Business Magazine Power 50 list; he is ranked as a leading Canadian corporate lawyer by both Chambers Canada and Lexpert Canada since 2016; and he was named one of the 25 most influential lawyers in Canada by Canadian Lawyer magazine in 2014. Among other philanthropic endeavors, Mr. Soliman is a board member of the Toronto SickKids Hospital Foundation, Ryerson University and the BlackNorth Initiative.

Rupert Duchesne, CEO of Mattamy Ventures

Rupert Duchesne is currently the CEO of Mattamy Ventures. He was previously the founding CEO and a Director of Aimia Inc. Mr. Duchesne previously held officer positions at Air Canada, and in strategy consulting. He is currently also a board member of the Art Gallery of Ontario, the Luminato Festival, and the International Festival of Authors, and previously Mattamy Group Corp, Dorel Industries, Alliance Atlantis and was the Chair of the Brain Canada Foundation. He is on the National Council of the C.D. Howe Institute. He is also a Member of the Order of Canada.

Wes Hall, Founder and Executive Chair, Kingsdale Advisors

Wes Hall is an established innovator, entrepreneur, and philanthropist. As Executive Chairman and Founder of Kingsdale Advisors, he has been named one of Canada's most powerful business people and one of the 50 most influential Torontonians. Additionally, Wes is the owner of QM Environmental, a leading environmental and industrial services provider; Titan Supply, a top manufacturer and distributor of rigging and wear products serving industries in the oil and gas, construction and transportation sectors; and Harbor Club hotel, Curio Collection by Hilton, one of St. Lucia's premier resorts. He is also the Founder and Chairman of The Canadian Council of Business Leaders Against Anti-Black Systemic Racism and the BlackNorth Initiative, committed to the removal of anti-Black systemic barriers negatively affecting the lives of Black Canadians. Wes is currently a director of SickKids Foundation and a board member of Pathways to Education and Toronto International Film Festival.

Melissa Kennedy, Executive Vice President and Chief Legal Officer, Sun Life

Melissa Kennedy is a member of the International Leadership team, Executive Sponsor of Sustainability and leads Sun Life's legal, compliance, and government relations global teams. Before joining Sun Life, she was SVP General Counsel at Ontario Teachers' Pension Plan; VP Associate GC at CIBC and head of the litigation team at the OSC. In 1996, she was appointed by the Ontario government to the TVO board of directors and in 2014 to Ontario's Technical Advisory Group on Retirement Security. She previously co-chaired U of T's Faculty of Law's fundraising campaign, is a founder member of Canada's Legal Leaders for Diversity and has served on the boards of Sun Life's joint venture with a Chinese state-owned bank based in Beijing, and Toronto Financial Services Alliance. Melissa currently serves on the boards of the Asia Pacific Foundation; Soulpepper Theatre; Association of Corporate Counsel; MFS Investment Management; Sun Life Capital Management (chair); and BentallGreenOak. In 2020, she served as an expert advisor to the Canadian Task Force for a Resilient Recovery.

Cindy Tripp, Founding Partner, former Managing Director, Co-Head Institutional Trading of GMP Securities L.P.

Ms. Tripp is an experienced financial services executive and one of the founding partners of GMP Securities L.P., where she was previously Managing Director, Co-Head Institutional Trading. She has overseen institutional trading, retail trading, securities lending, foreign exchange and risk management. Ms. Tripp is a former member of the board of Avante Logixx, former Chair of the Board of the Bishop Strachan School, a Director of the Georgian Bay Land Trust, and a former board member of Toronto Financial Services Alliance.