

July 2020

Capital Markets Modernization Taskforce

CONSULTATION REPORT



Table of Contents

Part 1: Overview	1
1.1 Message from the Chair	1
1.2 Background.....	3
1.3 Initial Stakeholder Feedback.....	5
Part 2: Key Issues and Proposals	6
2.1 Improving Regulatory Structure.....	6
2.2 Regulation as a Competitive Advantage	10
2.3 Ensuring a Level Playing Field	19
2.4 Proxy System, Corporate Governance and Mergers and Acquisitions.....	24
2.5 Fostering Innovation.....	32
2.6 Modernizing Enforcement and Enhancing Investor Protection	34
Part 3: Path Forward	47
3.1 Process for Making Submissions	47
Appendix: Taskforce Members Biographies	48

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 Ontario government. The document is also not necessarily reflective of the views or positions of the Expert Advisory Group or endorsed by its members.

Part 1: Overview

1.1 Message from the Chair

In February 2020, the Ontario government established the Capital Markets Modernization Taskforce and appointed my four fellow Taskforce members and myself to review and modernize Ontario's capital markets. Unlike other expert panels, this is a Taskforce that reports directly to the Minister of Finance. We are incredibly honoured to be entrusted with this opportunity to propose substantive changes that will benefit Ontario's capital markets.

A vibrant economy needs vibrant capital markets, driven by innovation, competition and diversity. Since the last securities regulatory framework review in 2003, the financial system globally has undergone systemic changes, particularly in response to the 2008 global financial crisis. More recently, the ongoing COVID-19 pandemic has highlighted the need for modernized capital markets in a post-pandemic economy that would assist businesses raise capital, incubate innovative companies, invigorate large and small intermediaries, and protect investors. The Minister has tasked us with developing bold, innovative recommendations that are not just solving yesterday's issues but are transformative and forward looking, and we hope to deliver on that mandate.

Over the last few months, including throughout the COVID-19 lockdown period, the Taskforce has been hard at work, listening to over 110 stakeholders about the challenges they face. We have met with some of the largest financial institutions and publicly listed companies in Canada. We have also listened to independent investment dealers, start-ups, entrepreneurs, investor advocacy groups and academics.

Through our initial consultations, we have heard what is important to stakeholders and what can be improved, including but not limited to:

- streamlining the regulatory governance structure and framework;
- reducing legislative and regulatory burden on the sector;
- encouraging competition between market participants;
- helping businesses grow and attract investment;
- ensuring regulations are adaptive to technological advancements;
- enhancing investor protection;
- aligning regulatory models; and
- enhancing diversity in our capital markets.

On behalf of the Taskforce, I would like to thank the stakeholders who have provided input to us thus far and encourage continued stakeholder feedback as the Taskforce aims to transform the regulatory landscape for the capital markets sector in a post-pandemic economy. To-date, we have formulated over 70 recommendations corresponding to the different areas of focus identified above. At this time, we would benefit from your feedback on the 40+ most high-impact policy proposals in our work so far, outlined in this report. Your continued input is important in the development of our final, prescriptive and more comprehensive list of recommendations to the Minister of Finance on how to help build Ontario's economy to benefit people across the province.

This report was 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 would also like to thank Assistant Deputy Minister David Wai, Sunita Chander, Shameez Rabdi, Jeet Chatterjee, Luc Vaillancourt and Diane Yee at the Ministry of Finance, as well as the Ontario Securities Commission for their support in this process. I would also like to thank Heidi Reinhart, Rowan Weaver, Abigail Court and Daniel Weiss from Norton Rose Fulbright Canada for their support to the Taskforce. I would also like to thank members of the Expert Advisory Group for their ongoing support.

Together, we will modernize our capital markets regulatory framework that will support and sustain a healthy and prosperous capital markets ecosystem, making Ontario one of the most attractive capital markets in the world.

A handwritten signature in black ink, appearing to read 'Walied', with a large, sweeping flourish above the name.

Walied Soliman
Taskforce Chair

1.2 Background

The securities regulatory framework was last reviewed in 2003, well over 15 years ago. The last committee to review Ontario’s capital markets, chaired by Purdy Crawford, was convened in 2000 and released a report three years later. Since this last review, the global financial system has undergone systemic changes, particularly in response to the 2008 global financial crisis. More recently, the ongoing COVID-19 pandemic has highlighted the need for modernized capital markets to assist businesses raise capital, incubate innovative companies, and protect investors.

As part of its commitment to modernize Ontario’s capital markets, the government established the Capital Markets Modernization Taskforce in February 2020 and appointed members to review and make recommendations to modernize Ontario’s capital markets regulation. The Taskforce members include:



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



Rupert Duchesne,
Former CEO and Director of Aimia



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



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

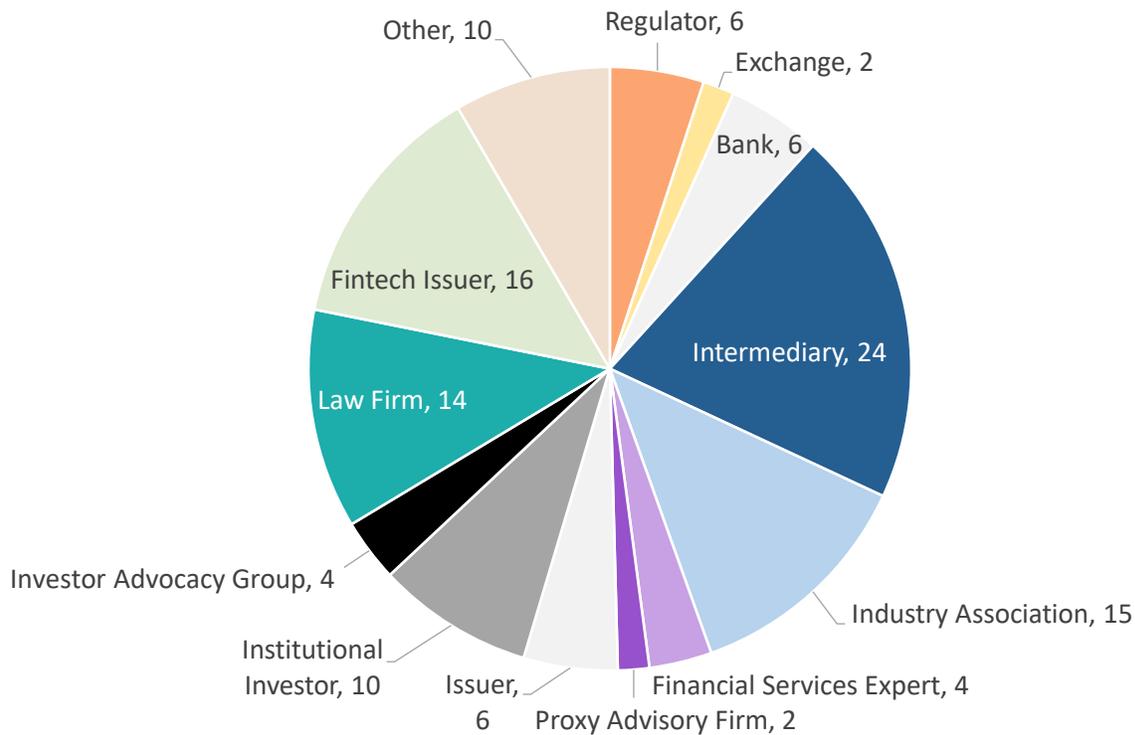


Cindy Tripp,
Founding Partner, former Managing
Director, Co-Head Institutional
Trading of GMP Securities L.P.

Appendix A contains the biographies of all Taskforce members.

Over the last few months, the Taskforce met with over 110 stakeholders to elicit preliminary feedback on the challenges businesses and investors face in our capital markets ecosystem. This involved in-person consultations which transitioned to online consultations during the COVID-19 pandemic, as well as some written submissions. These stakeholders have included capital markets regulators, market exchanges, financial institutions, industry associations, independent intermediary firms, law firms, issuers and investor advocacy groups.

Stakeholder Consultations



This feedback has been instrumental in identifying over 70 key issues and/or proposals with an overarching theme of supplementing the policing function of our capital markets regulatory framework with a public policy imperative of growing the capital markets in Ontario. Our proposals broadly fall into the following categories:

- Governance of regulators;
- Fostering innovation in capital markets by improving the regulatory structure;
- Reducing duplicative regulatory burden;
- Building a competitive economy for Ontarians by ensuring a level playing field between large and small market players; and
- Improving investor protection.

Via this consultation report, the Taskforce is soliciting stakeholder feedback in relation to 47 high-impact policy proposals to further modernize Ontario's capital markets regulatory framework. These proposals, which are based on initial feedback we have received from stakeholders, are for discussion purposes and may not reflect the final positions of the Taskforce. Your input is important to us. It will be considered carefully as we work towards finalizing our recommendations.

As opposed to previous panel reviews which were spaced over multiple years, we are aiming to deliver our final report to the Minister of Finance by the end of 2020. Our final report will contain a broader set of prescriptive recommendations intended to promote growth and competition in Ontario's capital markets, while upholding investor protection.

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 Cooperative Capital Markets Regulatory (CCMR) system. CCMR would increase harmonization in capital markets regulation and enhance investor protection by providing for stronger compliance enforcement. Our proposals may support the work being done currently by Ontario in collaboration with its partners to establish the CCMR.

The Taskforce supports the Ontario Securities Commission's (OSC) Regulatory Burden Reduction project and would encourage the timely execution of their recommendations to reduce burden and save time and costs for businesses where possible.

1.3 Initial Stakeholder Feedback

In order to help guide the stakeholder consultations conducted to date, the Taskforce developed a discussion statement which has served as the premise for our work. The discussion statement is as follows:

Ontario needs to attract and grow businesses that support and sustain an innovation economy that can compete for investment and talent worldwide. The purpose of securities regulation is to protect investors in a manner that inspires confidence in the capital markets and limits systemic risk, while creating an environment where enterprising companies choose Ontario as the optimal place to raise capital and establish an active presence. In order to attract these companies, there must be an ecosystem in place that supports new and existing issuers of all sizes in new and emerging industries to efficiently access the capital markets through a robust and diverse intermediary market.

What changes to the current regulatory regime do you see as necessary to modernize this ecosystem in order to make Ontario one of the most attractive capital markets in the world?

In response to the discussion statement, stakeholders highlighted key issues and presented solutions which impact various tenets of our capital markets ecosystem. The issues raised ranged from ensuring a level playing field between independent and institutional market participants to enabling smarter regulation and protecting vulnerable investors. The policy proposals outlined in this document reflect the stakeholder feedback we have benefitted from to-date.

Part 2: Key Issues and Proposals

2.1 Improving Regulatory Structure

Ontario Securities Commission (OSC) Governance

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

The aim of this change is to, institutionally and culturally, supplement the policing function of the primary regulator with a public policy imperative of growing the capital markets in Ontario. This leads to vibrant capital markets, fueled by innovation, competition and diversity. Other securities regulators, such as the U.K. Financial Conduct Authority, Australian Securities and Investments Commission and the Monetary Authority of Singapore, have a capital markets growth and competition mandate, which allows these regulators to reduce systemic barriers to growth, including fees and anti-competitive behaviour.

Discussion:

Given the significant role the OSC plays in relation to the vitality of the capital markets and investments in Ontario's businesses, the Taskforce proposes incorporating the fostering of capital formation and competitive capital markets to the OSC's mandate to encourage economic growth. This would lead to the development of a competitive and innovative capital markets regime and would be a timely response to reinvigorate a post-COVID-19 pandemic economy in Ontario.

How would incorporating capital formation and fostering competitive capital markets into the OSC's mandate help spur economic growth in Ontario? Would such changes impact the OSC's remaining mandates (i.e., fostering fair and efficient capital markets, protecting investors and reducing systemic risk)?

2. 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. However, throughout the Taskforce consultations, stakeholders have indicated that the OSC's current governance structure is an impediment to its role as a modern and globally competitive capital markets regulator. Stakeholders have noted that corporate governance would be strengthened by ensuring that the adjudicative process adheres to the appropriate boundaries between rule-making and adjudicative decision-making by separating these functions. There is a growing consensus among policy-makers and legal experts, including a number of previous expert panels on Ontario's capital markets¹, that a bifurcated model, with the regulatory and administrative functions separated, aligns with proper corporate governance practice.

¹ https://www.osc.gov.on.ca/documents/en/Securities/fyr_20040818_fairness-committee.pdf

The recently established Financial Services Regulatory Authority of Ontario (FSRA) has separate Chair and CEO positions and enforcement proceedings are brought to a separate tribunal, the Financial Services Tribunal. In addition, the proposed CCMR structure agreed among the participating jurisdictions contemplates a tribunal as a division of the cooperative regulator, as well as separate Chair and CEO positions.

Discussion:

The Taskforce is proposing to separate the regulatory and adjudicative function of the OSC. This could be achieved through: (1) a separate tribunal, comprised of adjudicators and its own staff, within the current OSC structure, or (2) by creating a new capital markets adjudicative tribunal as a separate entity from the OSC. A tribunal within the existing OSC structure would report to the existing Adjudicative Committee of the OSC Board and continue to maintain a collaborative, yet independent, relationship with OSC regulatory policy staff and allow adjudicators to stay knowledgeable on the most recent regulatory developments.

A new tribunal would be independent from the OSC and report directly to the Minister of Finance with no institutional relationship with OSC regulatory policy staff.

Under both options, the Board of Directors of the OSC, led by the Chair, would focus on the strategic oversight and corporate governance of the regulator. The CEO, a separate position from the Chair, would focus on the day-to-day management of the regulator. Lastly, a Chief Adjudicator would be appointed to oversee the adjudicative responsibilities of the tribunal.

Under this proposed structure, the CEO's compensation should be tied to key performance indicators provided to the OSC's board by the Minister of Finance. The key performance indicators should be subject to a periodic review and updates, as necessary.

An added benefit of this proposed structure is a more defined line between the Minister of Finance and staff through a Board and CEO who would advance the public policy mandates of capital market growth and investor protection.

Would commenters see greater efficiencies in maintaining a separate adjudicative tribunal within the current OSC structure? Would commenters prefer an independent tribunal that reports directly to the Minister of Finance? Under this new structure, who should have the authority to exercise rule-making (i.e., the CEO or the Board of Directors)? Are there certain matters that should not be transferred to a tribunal, but retained by the regulatory side of the OSC, such as mergers and acquisition hearings? In addition to capital market growth and investor protection, what other public policy imperatives — such as rules or a principle-based approach, for example — should be included in an initial mandate letter?

Self-Regulatory Organizations (SROs)

3. Strengthen the SRO accountability framework through increased OSC oversight

Currently, the Canadian Securities Administrators (CSA) conducts risk-based oversight of the two capital markets SROs, the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (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.

The two national SROs play an important role in reducing the fragmentation in Canadian capital markets regulation and are at the forefront of developments in 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 be aligned with Ontario's vision to protect investors and facilitate growth in the capital markets. This is why we are proposing to revisit the SROs' recognition orders to enhance their governance and oversight. The intent of this proposal is not to create further fragmentation, but rather support the OSC and the CSA's efforts to improve the existing SRO structure.

The Taskforce heard from multiple stakeholders that the current governance and oversight framework is inadequate for IIROC and MFDA, does not consistently ensure alignment with the public interest, and results in unnecessary regulatory burden and cost on SRO-regulated firms. There should be greater stakeholder input on the SRO's strategic and regulatory priorities to ensure that the SROs are spending resources on and undertaking a regulatory program that is aligned with the public interest.

Discussion:

For the reasons outlined above, the Taskforce proposes giving the OSC greater tools to oversee both SROs and any SRO that may replace them in the future. This would allow the OSC to ensure that both SROs fulfill their public interest mandate and that their approach to regulating registered firms is not overly burdensome or costly. This would also allow the OSC to fulfill its own objective of fostering fair and efficient capital markets through its oversight of the SROs. Stronger governance is also required to ensure that the appointment of the board of directors of SROs is independent of the management of the SROs.

The Taskforce proposes adding the following requirements to the OSC's recognition order for both SROs: submit an annual business plan covering all activities conducted in Ontario to the OSC for approval; OSC veto on any significant publication, including guidance or rule interpretations; OSC veto on key appointments, including the Chair and the President and CEO, and term limits for key appointments. Both SROs should also be required in the recognition order to have directors with investor protection experience. Lastly, the compensation and incentive structure applicable to SRO executives should be linked to the delivery of the public interest and policy mandate delegated to these bodies.

The Taskforce also proposes that the OSC work with the other CSA regulators to transform how directors are appointed for SROs. Up to half of the directors should be appointed jointly by all CSA regulators and a mechanism should be put in place to resolve CSA disagreements on the choice of

appointees in a timely manner. The Taskforce is also proposing to continue ensuring the independence of independent directors by having requirements similar to those applicable to an independent director of a public company, including a cooling-off period between working for a member firm and becoming an independent director. The number of independent directors should be higher than the number of directors from member firms. The actual number would have to be determined by function of how many directors would be appointed by the CSA. The SRO Chair would be required to be an independent director. These measures would instill a sense of confidence in both the oversight and functioning of both SROs.

The Taskforce is also considering proposing the creation of an ombudsperson service to address any complaints that SRO member firms may have about services received from their respective SRO.

Please provide feedback on the proposed approach and outline any challenges and concerns that may arise from this proposal that would apply to both SROs and any SRO that may replace them in the future. With respect to the proposal to create an ombudsperson service that addresses services provided by both SROs or any SRO that may replace them in the future, would commenters think that would be helpful and what should the role and powers of the ombudsperson service be? If an ombudsperson is recommended, what would be the possible protocols to ensure that it is not treated as a source of appeal of regulatory decisions?

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

A number of dealers have dual platforms and are jointly regulated by both IIROC and MFDA, resulting in duplicative regulation. Given the evolution of the industry, having two separate SROs to regulate investment dealers and mutual fund dealers is outdated and is confusing to investors. Moving to a single SRO for all registered firms in capital markets that provide advice to investors would reduce regulatory complexity and costs, and would harmonize and modernize regulation across Canada.

Discussion:

To reduce regulatory fragmentation and arbitrage, the Taskforce proposes a two-phased approach to the move towards a single SRO further to the CSA-led process to review the structure of SROs in Canada that was recently announced.

In the immediate term, the Taskforce proposes to create a new single SRO that regulates both investment dealers and mutual fund dealers. This new single SRO would continue to conduct national market surveillance. It would reduce costs for dually regulated investment dealers and would result in a streamlined approach to enforcement. An underlying principle of the move to the new SRO would be that regulatory oversight must be commensurate with the market participant's size and sophistication.

In the longer term, within twelve to eighteen months, the Taskforce proposes to further streamline regulation by transferring oversight of all firms distributing products and providing advice to investors, such as exempt market dealers, portfolio managers and scholarship plan dealers, from the OSC to the new SRO. It would also carry out statutory registration functions on behalf of the OSC for all of these firms, including registration of firms and individuals.

A single SRO structure that covers all registered firms providing advice to investors would lead to non-duplicative regulatory oversight, which is essential to healthy and efficient capital markets. The proposed two-phased approach is aimed to minimize disruption to SRO regulated firms while being responsive to the need to streamline regulations for dually regulated firms. The newly created SRO would operate subject to an enhanced accountability framework (as noted in the Taskforce's proposal above).

Please provide feedback on the proposed approach and outline any challenges and concerns that may arise from this proposal.

2.2 Regulation as a Competitive Advantage

Supporting Ontario's Issuers and Intermediary Market

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

Currently, securities issued by an exempt market issuer under certain prospectus exemptions, such as the accredited investor exemption, are subject to a four-month restricted period before becoming freely tradable.

Multiple stakeholders have indicated that given the sophistication and knowledge of clients who qualify as accredited investors, this four-month hold is an unnecessary regulatory burden that reduces liquidity for investors.

Discussion:

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

Subjecting an issuer to a seasoning period allows them to develop an adequate disclosure record for secondary investors to rely upon. Allowing stock to become freely tradable so long as the issuer has completed the seasoning period would invigorate the secondary market and provide such issuers with additional capital raising opportunities. Trades over an exchange would be permitted.

In order to prevent indirect underwritings to investors who are not accredited, the issuer and any dealer involved in the distribution would be required to take reasonable steps to ensure that the accredited investor (AI) is purchasing as principal and not with a view to further distribution. Such

reasonable steps could include representations and warranties in the purchasers' subscription agreements that they are purchasing the securities with investment intent and not with a view to distribution, provided that such representations and warranties are reasonable in the circumstances. In addition, the underwriter registration requirement and registrant obligations would apply to any accredited investor that purchased securities with a view to further distribution.

Are there any challenges or concerns that may arise from this proposal? If the holding period is not eliminated, what is the minimum period that would balance the objectives of the holding period and not unduly impede resales? Should this measure be expanded to other prospectus exemptions that currently require a four-month hold? What impact would the elimination or shortening of the holding period have on the willingness of issuers to do prospectus offerings and exempt offerings?

6. Streamlining 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 provide accompanying Management Discussion and Analysis (MD&A). However, many stakeholders, especially smaller issuers, have noted the significant costs and resources allocated 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 that may not experience significant changes to their operations that would be reflected in the financial statements.

Discussion:

To minimize regulatory burden, the Taskforce is considering changing the requirement for quarterly financial statements to allow for an option for issuers to file semi-annual reporting.

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

7. 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.

Discussion:

The Taskforce proposes 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 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 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 OSC 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 System for Electronic Document Analysis and Retrieval (SEDAR).

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 civil and statutory protections associated with prospectuses would not be available to investors under this model.

However, because of the maximum limit, significant transactions will continue to require a prospectus.

What are some of the conditions that should be imposed on issuers relying on the alternative offering model prospectus exemption? Should issuers opting into semi-annual reporting (Proposal #6) be covered under this exemption?

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

Stakeholders have noted that publicly listed companies are increasingly relying 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. Other than for the most senior issuers, the risk of a failed transaction is leading to less use of the short form prospectus structure.

Discussion:

To facilitate the greater use of the prospectus system, the Taskforce is proposing liberalizing the ability for reporting issuers to pre-market transactions to institutional accredited investors prior to the filing of a preliminary prospectus. The Taskforce believes that a greater ability to communicate with potential investors to gauge the demand for a public offering would minimize the risk of failed transactions. The greater flexibility should be accompanied by increased monitoring and compliance examinations by regulators of the trading by those who have advance information concerning an offering in order to deter insider trading and tipping. The Taskforce does not propose to make any changes to the bought deal exemption.

Do you think that the current prohibition on pre-marketing prospectus offerings continues to serve a useful purpose? If pre-marketing is expanded, should this be accomplished through a change to the prohibition generally or by introducing an exemption? Should conditions be attached to the ability to pre-market transactions more freely, such as: limits on the period that pre-marketing can be done, a requirement to enter into confidentiality and standstill agreements, limits on the number of potential investors that can be involved, or a requirement to reserve a portion of the offering for other investors? What other conditions should be applicable when companies choose to pre-market? Will this proposal result in less investment opportunities to retail investors? Do you have any concerns about increased insider trading or tipping as a result of increased pre-marketing? If so, what steps should be taken to deter such conduct?

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

As technology continues to advance and access to the internet 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) and environmental impact of providing information when compared to physical delivery. Many stakeholders have commented on the timeliness of electronic delivery and expressed a general preference for less paper-based communication.

Discussion:

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

The Taskforce suggests that an access equals delivery model could be used for the delivery of documents, including: a prospectus under prospectus offerings by reporting issuers, annual and interim financial statements and related Management Discussion and Analysis (MD&A) of reporting issuers, and the management report of fund performance (MRFP).

Please provide feedback regarding which of the above communication and regulatory documents (and suggestions for others) should be made available electronically rather than delivered. How should shareholders be kept informed of these documents (i.e., one-time verification that shareholders will continuously monitor a company's website notifying electronic delivery of communication documents)? How long should a transition period be if the access equals delivery model is adopted? Are there instances whereby physical delivery of such documents is more well-suited? Would the implementation of an access equals delivery model raise any investor protection or investor engagement concerns and what are potential solutions? Should this be extended to issuers in exempt markets? In what time frame should this transition to the access equals delivery model occur, e.g., six months after the publishing of the Taskforce's final report? Lastly, what other measures could be pursued to promote the digitization of capital markets? What other reporting requirements could be streamlined in order to benefit capital market participants? Which documents should be required to be electronically delivered and which ones should be posted on the company's website?

10. Consolidating reporting and regulatory requirements

As our capital markets regulatory framework modernizes, to reduce the burden of initially listing on a market exchange and continue to maintain a public listing, 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 of disclosure that investors must absorb. This leads to concerns about information overload.

Discussion:

The Taskforce supports reducing regulatory burden for companies' reporting requirements to reduce compliance costs where possible, while maintaining investor protection and an appropriate level of disclosure. The Taskforce is considering streamlined reporting and regulatory requirements, including but not limited to:

- a. Combining the form requirements for the Annual Information Form (AIF), Management's Discussion & Analysis (MD&A) and financial statements
- b. Simplifying the content of the Business Acquisition Report or revising the significance tests so that BAR requirements apply to fewer significant acquisitions

What are some specific reporting requirements arising from regulatory disclosures as noted above, such as the MD&A and Annual Information Form, that can be removed, consolidated and/or streamlined to reduce duplication and regulatory burden while upholding investor protection?

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

Exempt market dealers (EMDs) have traditionally played an important role in assisting smaller issuers and start-ups to raise capital at the pre-initial public offering (IPO) stage. However, as smaller issuers grow and seek financing via a prospectus offering, EMDs are often unable to continue supporting these issuers. EMDs are currently prohibited from participating as selling group members in prospectus offerings even though they were previously allowed to do so. Allowing EMDs to again participate would enable them to maintain their relationships with issuers following an IPO and would open up 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 Capital Pool Company (CPC) offerings (used by smaller issuers under the TSX Venture Exchange's (TSXV) capital raising framework because the TSXV's CPC Policy require at least one agent in the CPC offering to be an IIROC member).

Discussion:

The Taskforce proposes that the OSC and TMX allow EMDs to act as “selling group members” in the distribution of securities made under a prospectus offering. The proposal would include CPC offerings, both in relation to initial public offerings and prospectus offerings in connection with a qualified transaction.

The Taskforce also proposes that the OSC work with stock exchanges to allow EMDs to act as sponsors in reverse-takeover transactions (RTOs).

How would these proposals invigorate the intermediary market? What are the potential benefits and concerns of these proposals?

12. Develop a Well-Known Seasoned Issuer Model

In the U.S., a well-known seasoned issuer (WKSII), defined as an issuer that is above a certain public float or has issued debt securities above a set amount in a specified time period, and has established an appropriate disclosure record, is subject to a less burdensome shelf registration process. WKSII can register their securities offerings on shelf registration statements that become effective automatically upon filing. Stakeholders have suggested that such a process reduces regulatory burden on large issuers and makes it more cost-efficient to raise capital.

Discussion:

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

The OSC should also consider implementing additional changes to the shelf prospectus system to provide similar accommodations to those available to WKSII in the United States.

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

Do commenters view such a WKSII model to be appropriate for Ontario’s capital markets? If yes, what should be the appropriate threshold for an issuer’s public float and/or debt security offering to qualify for WKSII status?

13. 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 have advised us that short selling in connection with prospectus offerings is making pricing and execution of prospectus offerings more difficult. Since prospectus offerings 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 United States, 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 have noted to the Taskforce that bought deals pre-arranged with hedge funds that are shorting the stock before the bought deal is announced are rife in the Canadian markets and particularly targeting capital intensive industries. This harms the corporation, its shareholders and the uninformed investors trading against the short sellers.

Discussion:

The Taskforce proposes that the OSC consider adopting a rule that would prohibit market participants and investors that have previously sold short securities of the same type as offered under a prospectus or private placement from acquiring securities under the prospectus or private placements.

There are current requirements that could potentially apply to short selling in advance of a prospectus offering or private placements, such as: (i) market participants and investors who have access to material undisclosed information concerning the offering would be precluded from short selling by the insider trading prohibition; (ii) the underwriter registration requirement may apply to market participants and investors who sell short in advance of an offering and fill their short position through the offering, since this is a form of indirect distribution; (iii) insiders of the issuer who enter into securities lending arrangements in connection with short sales prior to an offering would be subject to reporting requirements and such transactions may also be limited by the insider trading prohibition and applicable blackout periods; and (iv) the prohibition on market manipulation may apply to conduct that artificially depresses the price of the securities. However, these requirements will require detailed and contextual analysis.

A simple requirement that would prohibit market participants and investors that have previously sold short securities of the same type as offered under a prospectus or through a private placement from acquiring securities would result in greater clarity for all market participants and would be less complicated from both a conduct and compliance perspective.

Would such a rule be beneficial in facilitating greater and more effective use of the prospectus or private placement system? When should the period with restricted short selling begin and how long should it extend? Are there any concerns with the operation or oversight of this potential rule? Should there be exceptions to the prohibition, such as for market makers?

14. Introduce additional Accredited Investor (AI) categories

In 2019, 90.5 per cent of capital raised under prospectus exemptions was raised through the use of the AI exemption. The current definition of AI includes individuals who meet specific income and net financial asset thresholds. Although these criteria may be indicative of one's ability to withstand potential market losses, they are not necessarily correlated with one's sophistication or ability to understand investments.

Discussion:

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

Would commenters recommend additional expansions to the existing AI definition? If so, which ones?

15. Expediting the SEDAR+ project

Currently, market participants may use up to six separate database platforms to file or search various electronic regulatory documentation. Many stakeholders have voiced concerns over the antiquated systems and the need to expedite the SEDAR+ project.

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 a 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 set for 2021.

Discussion:

The Taskforce supports the goal of the SEDAR+ project, which would enable greater burden reduction and efficiency, and proposes that it be accelerated. SEDAR+ would modernize the way in which market participants use the centralized system, making it easier to file and access documentation. Given the importance and impact SEDAR+ would have on market participants and their operations, the Taskforce recognizes the need to expedite this project.

What priority should be given to the development and launch of SEDAR+? The Taskforce also invites suggestions for further expansions or improvements in relation to SEDAR+ objectives.

2.3 Ensuring a Level Playing Field

Promoting Competition

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

Smaller and independent investment dealers have repeatedly raised the issue of intermediaries engaging in practices which may impede competition, such as arrangements where a commercial lender purportedly requires clients to retain the services of an affiliate investment dealer for their capital raising and advisory needs, as a condition for preferential rates on commercial lending transactions. As a consequence, issuers do not maintain their existing relationships with their independent investment dealer or exempt market dealer.

Although tied selling is restricted under the federal *Bank Act*, as well as National Instrument 31-103, multiple presentations from dealers and issuers have advised that commercial lenders, through their affiliated broker 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. However, we have also heard that some intermediaries indicate that their bundling of capital markets and other services result in lower financing costs for issuers. In addition, it may not be in the best interest of issuers to procure their underwriting and advisory services from their lender — they may benefit from independent advice.

Discussion:

The Taskforce proposes making legislative amendments to the *Securities Act* to extend the provisions of National Instrument 31-103 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 arise when an issuer is required, as an inducement for any service received from or in connection with any direct or indirect benefits received from a financial institution or any other affiliate, to terminate or curtail the services of any specified firm

registrant and replace it with services provided by a specified firm registrant affiliated with the financial institution.

A senior officer of a specified firm registrant, such as the Ultimate Designated Person, would attest that no such prohibited conduct has occurred each time the registrant provides such capital markets services to a reporting issuer with whom it had a commercial banking relationship. Stakeholders believe that such an attestation would be the most effective measure to drive behaviour beneficial to issuers, independent dealers and the capital markets generally.

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

These steps are carefully being proposed to ensure that this policy would be in line with provincial jurisdiction over registrants.

Would commenters consider this an important step towards re-invigorating Ontario’s intermediary market, particularly for smaller or independent intermediaries? Are the provisions in National Instrument 31-103 sufficient or should the amendments go further to prohibit exclusivity arrangements?

What provisions should the proposed prohibition include? Do commenters agree that it is in the best interest of issuers to receive advice independent of their lender? Do commenters agree that mandating independence from lenders in underwriting and advisory will enhance investor protection? What would be the implications, including costs, to issuers of doing this?

To increase the participation of independent dealers, should the Taskforce consider recommending mandating a specific percentage of all underwriting arrangements to be comprised of non-bank owned investment dealers?

Another option considered was a blanket prohibition for any registrant to provide capital market advisory or underwriting services to an issuer to which an affiliated financial institution is also providing commercial lending services. Do commenters feel that a full prohibition on lenders providing capital markets services to issuers would better achieve the desired outcomes?

17. Increase access to the shelf system for independent products

Currently, an estimated 80 per cent of distribution of investment products to investors is through bank-owned shelf distribution channels. There have been concerns raised that such 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 suggested to be of higher risk and, as such, excluded from the shelf.

In October 2019, the OSC released Client Focused Reforms (CFRs) which will require bank-owned 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.

Discussion:

The Taskforce supports the OSC's CFR initiative and reiterates the need for CSA/SRO oversight of product shelf issues, including targeted reviews and publication of guidance regarding conflicts of interest as a result of shelf composition.

In addition, the Taskforce proposes that closed product shelves/proprietary-only shelves should not be allowed in the bank-owned distribution channel and recommends a new requirement that all bank-owned dealers include independent products on their shelves if requested by an independent product manufacturer, unless the bank-owned dealer has determined, on a reasonable basis, that a particular product is not suitable for their clients. The OSC should consider a regulatory reporting requirement where such bank-owned dealers would report on the percentage of proprietary versus independent products on the shelf or sold on a quarterly basis.

To ensure that independent products are not unfairly excluded, bank-owned dealers will be required to document a detailed rationale when independent products are not added to their open shelves, and to provide a copy of that documentation to the independent product manufacturers that have requested a product be included on the shelf, within a certain period of time. Independent product manufacturers should be able to raise these restrictions with the regulator/SRO and their compliance staff should review such documentation to ensure compliance with regulatory requirements, including conflicts of interest requirements.

What concerns would commenters have with this approach? Would these requirements increase the access of independent and alternative products to retail investors? Should any entity that sells only proprietary products be labelled a sales person? Should there be a prohibition on charging a fee to gain access to a shelf, including no-advice channels? Should there be a review of redemptions from high performing third party funds into proprietary funds and report on those as well?

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

We have heard there is a funding gap for small issuers that want to raise capital for their business or that it is very costly for an issuer to become listed. In addition, there are retail investors that want to invest in these types of investments. However, individual investors may not have the know-how and confidence to make decisions on their own. The investment expertise of asset managers, retail investors' relationship with their dealing representative and established distribution channels in the public funds industry can help to provide the access and the confidence for retail investors to explore private equity investing. Asset managers can also lend their expertise to guide and help small businesses to overcome challenges. Retail funds' participations will further increase the depth in the private equity funding with more buyers and sellers.

Discussion:

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

In mutual funds, investors have the right to redeem on a frequent basis confining mutual funds to invest in liquid investments. In an interval fund, the fund has the control to provide liquidity to investors. Retail investors do not have the right to redeem. An interval fund is a type of closed-end fund that is not listed on an exchange, but periodically (every three, six or twelve months) offers to buy back a stated portion of its shares (typically 5 per cent to 25 per cent) from shareholders. Shareholders are not required to accept these offers.

Interval funds are priced daily at net asset value (NAV), but since they are not listed on an exchange, they do not trade above or below NAV.

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

Do you think this type of fund would provide a meaningful new source of financing for small businesses in Ontario? Should the scope of the investments, or a portion of the investments, for this type of fund be specifically limited to small businesses or expanded to other kinds of businesses? Since these funds would be available to retail investors, are there any specific conditions that should be prescribed to protect investors?

19. Improve corporate board diversity

Since 2014, TSX-listed companies have been required to provide disclosure regarding 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 on the representation of women in these leadership roles at TSX-listed companies has been slow, with the OSC reporting that the total board seats occupied by women in their review samples increased only from 11 per cent in 2015 to 17 per cent in 2019. Based on the OSC’s 2019 review, only 22 per cent of companies in their review sample had adopted targets regarding the representation of women on boards.

Investors require data on diversity on the board and in executive officer positions to make informed investment and voting decisions.²

As of this year, companies incorporated under the *Canada Business Corporations Act* (CBCA) are required to report representation of the following designated groups on boards of directors and in senior management: women, Aboriginal peoples, persons with disabilities and members of visible minorities.

Discussion:

The Taskforce proposes amending securities legislation to require TSX-listed companies to set targets, and annually provide data in relation to the representation of women, black people, indigenous people, and people of colour (BIPOC), on boards and in executive officer positions. What should be the appropriate target for women and BIPOC’s on TSX-listed company boards? One suggestion we have heard is 40 per cent women and 20 per cent BIPOC. TSX-listed companies are already required to report on their progress towards achieving any targets, but they should also be required to review and assess the appropriateness of the targets on an annual basis.

What timeline should be prescribed for these targets to be achieved, for example, within three to five years? What would commenters think would be ways to increase compliance for companies who do not meet these targets?

The Taskforce also proposes to amend securities legislation to require TSX-listed companies to adopt a written policy respecting the director nomination process that expressly addresses the identification of candidates who are women and BIPOC during the nomination process.

The Taskforce further proposes to amend securities legislation to set a 10-year maximum tenure limit for directors, with an allowance that 10 per cent of the board can exceed the 10-year maximum for up to two years. This is aimed to encourage an appropriate level of board renewal. The issue of board entrenchment and board renewal is a concern from a governance perspective as continued refreshment of the board helps to ensure that fresh and diverse perspectives and skills are brought into the boardroom.

² <https://www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity>

Lastly, the Taskforce recommends that diversity — including racial diversity — be similarly represented at the board and executive level of the OSC who will be responsible for discharging this important mandate.

Please provide feedback on the proposal above and identify any challenges or concerns that may arise. Should this requirement be extended to all reporting issuers?

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

The Taskforce has heard from multiple stakeholders that the current proxy and shareholder voting system reflects an imbalance between activist shareholders and the boards of issuers. Issuers facing activist shareholder campaigns may not always be able to adequately respond effectively due to a lack of transparency in shareholder ownership and voting in Canada. The Taskforce hopes that many of the proposals in this section will help address this issue.

Proxy Advisory Firms

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

PAFs play an important role in the proxy voting process by providing services that facilitate investor participation such as analyzing proxy materials and providing vote recommendations. 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’ provision of voting recommendations in respect of issuers to which PAFs also provide consulting services.

Discussion:

The Taskforce proposes to introduce a securities regulatory framework for PAFs to ensure that PAFs’ institutional clients are provided with the issuer’s perspective concurrent with the PAF’s recommendation report. The Taskforce proposes providing an issuer with a statutory right to rebut (at no cost) the reports published by PAFs, provided that the issuer published the relevant materials (such as the Management Information Circular) within a specified time period prior to the meeting. This right of rebuttal would apply, with respect to each of the issuer’s 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. The Taskforce also proposes a framework that ensures PAFs are not in a conflicted position when providing services to issuers and recommendations to clients by restricting PAFs from providing consulting services to issuers in respect of which PAFs also provide clients with voting recommendations.

Please provide feedback on the proposal above and identify any challenges or concerns that may arise. Should the issuer’s right of rebuttal be extended to shareholders making proposals, dissidents and parties to transactions for which proxy reports are being distributed? Does the proposal to restrict

PAFs to either providing consulting services or making voting recommendations in respect of an issuer appropriately address conflicts of interest?

Ownership Transparency

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

Currently, a shareholder is not required to disclose beneficial ownership of, or control or direction over, voting or equity securities of an issuer until it reaches the 10 per cent threshold. However, share ownership at the 5 per cent level is relevant to control of an issuer, in particular 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.

Discussion:

The Taskforce believes that, in an era of increased shareholder activism, the 10 per cent early warning reporting threshold is too high. The Taskforce proposes decreasing the shareholder reporting threshold in Ontario from 10 per cent to 5 per cent. The Taskforce suggests the threshold requirement be revisited to uphold harmonization if further changes are made under the U.S. regulatory framework.

The proposal will provide transparency of significant holdings starting at the 5 per cent level so that issuers can more proactively engage with their shareholder base and shareholders can benefit from increased awareness of sizable ownership interests.

Are there reasons to exclude certain issuers from the scope of the proposal, such as venture issuers or those below a specified market capitalization? Would requiring "passive" investors to report ownership at the 5 per cent threshold create undue burden relative to the benefits of disclosure?

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

Because institutional investors are generally not required to disclose their holdings unless they cross the 10 per cent reporting threshold, issuers and other market participants may not have adequate transparency into institutional investors' ownership positions. The lack of transparency hinders shareholder engagement and the ability for issuers to respond to shareholder concerns.

Discussion:

The Taskforce proposes to adopt a regime that would require institutional investors (who own above a certain dollar threshold) to disclose their holdings in securities of Canadian reporting issuers (that have a market capitalization above a certain threshold) on a quarterly basis. The process currently in place in the U.S. provides a proven framework for similar disclosure that could work in Canada.

Would the proposal provide useful information to issuers and other market participants? What types of exemptions should be provided from the reporting requirement, if any? What would be an appropriate length of lag time before the reporting requirement is in effect?

Shareholder Rights

23. Require TSX-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 the board's approach to executive compensation for issuers.

Discussion:

The Taskforce believes that developments in Canada, such as recently passed amendments to require advisory say on pay votes for *CBCA* companies, and other jurisdictions, such as the U.K., U.S. and Australia, support the adoption of mandatory annual advisory votes on executive compensation practices for all TSX-listed issuers.

The Taskforce recommends against binding votes because of the importance of preserving the board of directors' decision-making processes and to avoid the risk that shareholder proposal campaigns become too burdensome on issuers.

Are their concerns with the proposal to require annual advisory say-on-pay votes? Should the proposal be expanded to all reporting issuers?

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

In the U.S., the SEC has adopted informal procedures by which a company can seek a no-action letter from SEC staff providing their informal views on whether there is a basis for excluding a shareholder proposal from the company’s proxy materials. The SEC’s no-action letter typically addresses whether the issuer has a basis to exclude the proposal and may offer a remedy to the proposing shareholder to address concerns to allow publication with the issuer’s materials.

Discussion:

In Ontario, the requirements relating to shareholder proposals are set out in the *Business Corporations Act (OBCA)*. Companies and shareholders must apply to the court to settle disputes. The Taskforce proposes that the OSC be empowered to provide its informal views to issuers seeking to exclude shareholder proposals through a no-action letter. This procedure would provide stakeholders with an efficient means of addressing shareholder proposal disputes while reducing litigation in court. It would also allow for greater streamlining of the shareholder proposal process and screening of immaterial proposals.

Please provide feedback on the proposal above and identify any challenges or concerns that may arise. Would the OSC’s involvement improve the shareholder proposal process and reduce litigation costs? Should the OSC be involved by giving it a formal role under the OBCA, or by including proposals in securities legislation as done in the U.S.? Are there other areas of the OSC’s regulatory oversight that would benefit from the ability to issue a no-action letter?

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

Globally, and in Ontario, there is increased investor interest in issuers reporting on ESG-related information. While many issuers include ESG disclosures, both issuers and investors have expressed concerns about the lack of a standardized framework for this disclosure. Enhanced ESG disclosure can set the basis for improved access to global capital markets and enable an equal playing field for all issuers.

Currently, two widely prevalent frameworks exist that have global support and meet investor needs for concise, standardized metrics on material issues, the Sustainability Accounting Standards Board (SASB) framework and the Taskforce on Climate-Related Financial Disclosures (TCFD) recommendations.

Discussion:

The Taskforce proposes to mandate disclosure of material ESG information which is compliant with either the TCFD or SASB recommendations for issuers through regulatory filing requirements of the OSC. Where feasible, the proposed enhanced disclosure will align with the global reporting standards of both TCFD and SASB.

In order to give issuers time to effectively meet the disclosure requirements, implementation should be phased, to reflect the capacity and sophistication of smaller and larger issuers.

What specific material ESG information is needed beyond what is currently captured by existing disclosure requirements? Should there be a phased approach to implementation, including a comply-or-explain model? Is there a need for a short term “safe haven” regarding ESG disclosures? Should ESG disclosures be subject to the forward-looking information requirements set out in National Instrument 51-102 *Continuous Disclosure Obligations*, or what, if any, different considerations should apply?

Proxy Contests and M&A Transactions

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

The majority of shareholders do not attend shareholder meetings and must vote by proxy using either the company’s or dissident’s proxy ballot. Frequently in Canada, these proxy cards can look very different (universal, blended, single-slate, etc.) and are a source of complication for investors whose interests may not be represented on either proxy. These proxy ballots typically do not allow shareholders to vote for a combination of nominees, instead forcing shareholders to vote for either a company’s or dissident’s nominee slate.

Discussion:

The Taskforce’s proposal to facilitate the use of “universal proxy ballots” — a single ballot that lists the director nominees of each side of a dispute and allows a shareholder to vote for a combination of nominees — seeks to provide shareholders who vote by proxy with greater voting flexibility. Mandating disclosure of voting tallies on an ongoing basis to each side in a dispute where universal ballots are used will provide issuers and dissidents with greater transparency.

Please provide feedback on the proposal above and identify any challenges or concerns that may arise. Would the proposal help alleviate the inefficiencies and unfairness of the current approach to proxy ballots?

27. 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.

Discussion:

The Taskforce believes 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 so that minority shareholders have greater confidence in the role of the independent committee when an issuer is engaging in transactions regulated under MI 61-101.

Would an enhanced role for independent committees in transactions regulated under MI 61-101 be beneficial to minority shareholders?

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

The remedies available to the OSC to intervene under section 104 and section 127 of the *Securities Act* do not address the breadth of compliance and public interest matters that the OSC currently engages in in respect of M&A matters and proxy contests.

Discussion:

The Taskforce proposes that the OSC be granted new powers to enhance its public interest remedies in control contests and similar transactions. British Columbia recently enacted legislation to provide the British Columbia Securities Commission 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 Taskforce proposes granting similar powers to the OSC. Would the proposal provide a more efficient and consistent forum for market participants to resolve disputes in M&A matters and proxy contests?

Proxy Voting System

29. Introduce rules to prevent over-voting

Over-voting occurs when a meeting tabulator does not have documentation establishing that an intermediary submitting proxy votes is entitled to vote as of the meeting record date. If the over-voting is unresolved, the meeting tabulator may reject or pro-rate the proxy votes received.

Discussion:

The Taskforce proposes the following rules be introduced to prevent over-voting:

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

These proposals codify best practices found in CSA Staff Notice 54-305 *Meeting Vote Reconciliation Protocols*.

Are there other approaches that the Taskforce should consider to reduce the risk of over-voting?

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

In Canada, public issuers generally communicate with beneficial owners of securities indirectly through intermediaries that have outsourced their investor mailing and voting functions. At the time of account opening, an intermediary must obtain instructions on whether the client wishes to be a NOBO or OBO in respect of the securities held in that account. This determination allows an issuer to 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. Issuers are not currently able to directly mail proxy materials or solicit voting instructions from OBO securityholders.

Discussion:

The Taskforce proposes the removal of the NOBO/OBO status in Canada and to allow issuers to access the list of all beneficial owners of their securities. This would enable reporting issuers to know more about the true beneficial owners of their securities, and allow issuers to solicit voting instructions directly from such owners.

The Taskforce also recommends that an intermediary must also provide the beneficial owners' email address along with the physical address information currently provided to a reporting issuer that wishes to deliver proxy-related materials electronically and solicit voting instructions from such owners as well. Currently, intermediaries provide NOBO/OBO client account address information to outsourced third party service providers; however, beneficial owners are required to separately consent to receive proxy materials electronically directly from reporting issuers (or their transfer agents), which has resulted in a slow adoption rate for electronic delivery of proxy-related materials.

Should reporting issuers be entitled to know who their beneficial owners are? And if so, should beneficial owners be allowed to opt out of being solicited for voting instructions directly by a reporting issuer? If not, are there specific events (i.e., M&A) that should require mandatory disclosures of security positions in reporting issuers? What, if any, are the investor protection concerns with intermediaries providing electronic delivery instructions on behalf of clients delivering proxy-related materials electronically when their investor account address information is already being provided by intermediaries to third parties?

2.5 Fostering Innovation

31. Create an Ontario Regulatory Sandbox in order to benefit entrepreneurs and start-ups. In the longer term, consider developing a Canadian Super Sandbox

Globally, regulatory sandboxes have allowed businesses to test new and innovative products, services, business models and delivery mechanisms in the real market, with real consumers with expedited blanket relief orders.

Discussion:

To spur the growth of innovative companies, the Taskforce proposes the creation of an Ontario Regulatory Sandbox that would have an expanded scope to include new and existing innovative start-ups operating across the financial services sector in Ontario. Firms would be allowed to test innovative products and business models with a light regulatory touch.

The Ontario Regulatory Sandbox would be undertaken jointly by the OSC LaunchPad and the FSRA. There are several entrepreneurial models that are subject to regulatory oversight that overlaps between the OSC and FSRA. In the longer term, the Taskforce proposes an expansion of this Sandbox into a Canadian Super Sandbox in which all provincial and federal financial services regulators allow Canadian financial services businesses to test their innovative ideas. This would spur innovation nationally.

Would the creation of an Ontario Regulatory Sandbox and a Canadian Super Sandbox help spur innovative start-ups and entrepreneurs to grow and raise capital? If so, other than expedited blanket relief orders, what other services/regulatory relief can these sandboxes offer to help businesses raise capital and apply lighter touch regulation to allow these businesses to innovate? What are other ways that the OSC can help foster innovation? What sort of cultural changes would be required at the OSC in order to develop a flexible approach to regulation to foster economic growth and innovation?

32. Requirement for market participants to provide open data

Advancements in technology have not only assisted businesses to operate more efficiently and seek new and innovative business models, but also have 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 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 financial technology (FinTech) solutions require open data to create efficiencies and offer better technology solutions for business and services to its customers/investors.

Discussion:

Other global jurisdictions, including the U.K. and E.U., mandate open data to increase competition and promote alternatives to consumers giving them choice, while other jurisdictions, such as Japan, India and Singapore, have promoted data sharing arrangements. The Taskforce proposes that the OSC mandate that capital market participants provide open data so that data sharing arrangements can be further encouraged and facilitate more FinTech solutions for businesses (thereby reducing costs and minimizing duplication of processes) and investors. Greater accessibility to data would assist businesses in providing new products/services and long-term solutions to support innovative business models, but it must be done while ensuring investor protection and privacy of investors are not compromised.

Do market participants view open data as an opportunity to innovate and improve business operations? Please identify any concerns or challenges that may arise from this proposal and any corresponding solutions. Do you see a role for the province in setting data protection and privacy standards?

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

The COVID-19 pandemic has reiterated the importance of capital formation for start-ups and entrepreneurs in ensuring a sustainable economy.

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 expertise in particular industries and assist in reducing the cost of capital of a transaction. Angel investor groups generally seek to invest in a diversified portfolio of start-up businesses, where smaller investments are made by many investors across many issuers, thereby helping to diversify the 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, and may, in certain circumstances, trigger registration under traditional concept of registration.

Discussion:

The Taskforce proposes modernizing the rules so that this early-stage financing of start-ups can be undertaken by angel groups to assist with capital formation. The Taskforce proposes changes to the current registration requirements to enable angel groups to work with their “accredited investor” members to encourage investments in early stage issuers.

Please provide feedback on the proposed approach and outline any challenges and concerns that may arise from this proposal. Should this apply to only not-for-profit angel groups? Should changes in registration requirements be by way of regulatory relief (exemption), exemptive relief or through a

form of no-action letter (as discussed elsewhere in this consultation report) when meeting specific requirements? How can P2P lending frameworks be leveraged to support capital raising of such early-stage start-up businesses?

2.6 Modernizing Enforcement and Enhancing Investor Protection

Modernizing Enforcement

Proposals in this section are made assuming a separation of the adjudicative and regulatory functions of the OSC.

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

The Taskforce's proposed changes to reciprocation under the *Securities Act* would help ensure that respondents who have been sanctioned by other regulators, courts, SROs or exchanges are kept out of Ontario capital markets much more promptly and efficiently than they are currently. These changes would enhance investor protection and the integrity of the capital markets. Similar automatic reciprocation provisions have been enacted in all Canadian provinces and territories except Ontario, Newfoundland and Labrador, and Nunavut.

Discussion:

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

Orders by courts, foreign regulators, SROs and exchanges would be reciprocated by the OSC on a streamlined basis, without respondents being granted an opportunity to be heard.

The proposed changes are predicated on the idea that a fair hearing has already been provided, making an OSC hearing unnecessary. Reciprocated orders or settlements would not have automatic effect in Ontario unless the OSC has the power to make a similar order or settlement. Monetary sanctions or voluntary payments agreed to in a settlement would not be reciprocated.

Do commenters think that there are certain types of orders that should be excluded from this proposal and should not be automatically reciprocated or not be reciprocated by the OSC without a requirement to provide a hearing, and, if so, which types of orders? What are the potential concerns with such proposed changes and what safeguards should be put in place to ensure fairness of the

process for affected individuals, companies or other entities? For example, the Taskforce is considering requirements such as: the OSC assessing whether foreign jurisdictions offer fair hearings, and if circumstances warrant, permitting a respondent an opportunity to be heard; the publication of all reciprocated orders by OSC; and the OSC providing a clarification right (in lieu of an appeal right) for automatically reciprocated orders.

35. Improve the OSC's collection of monetary sanctions

Collecting monetary sanctions (administrative penalties, disgorgement, costs and voluntary payments agreed to under the terms of a settlement) has and continues to be challenging for all regulators including the OSC, especially where the company or individual sanctioned is not a market participant. In 2019, for the monetary sanctions resulting from settlements and contested hearings ordered during the year, the OSC had an average collection rate of only 34.9 per cent, with 0 per cent collected from non-market participants in contested hearings. 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. Another challenge with collections is that the OSC has limited tools to incentivize payment of monetary sanctions.

Discussion:

The Taskforce proposes to give the OSC additional tools to help improve the OSC's collection of monetary sanctions. What tools do commenters think would be appropriate to help improve the OSC's collection rate for monetary sanctions? The Taskforce is putting forward the proposals below for consideration by commenters. These proposals are based on recent amendments to the British Columbia *Securities Act*. Please let the Taskforce know of any concerns with these proposals or if commenters have other recommendations about how to improve OSC's collection of monetary sanctions.

a. The Taskforce proposes giving the OSC more effective powers to freeze, seize or otherwise preserve property, including property transferred to family members or third parties below fair market value

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 proposes that the OSC also be permitted to freeze any assets, starting at the investigation stage, by establishing that the assets are being preserved in order to return money to harmed investors or to satisfy a possible disgorgement, monetary sanction, or costs order.

The Taskforce also proposes 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. Transfers to family could potentially have occurred before the misconduct at issue in the investigation had begun. OSC's exercise of its freeze and seizure powers would continue to be through court orders.

In addition, the OSC would, subject to obtaining court authorization, have the power to dispose of frozen assets to retain value prior to a hearing and any potential monetary sanctions being ordered. There would no longer be a limitation period for collections and the OSC's writs of seizure and sale would no longer expire.

Given the important expansion proposed to preservation orders and collection powers, there would be a right to a hearing in front of the OSC tribunal to request a clarification, variation or revocation of a preservation order (as is currently the case for freeze directions).

What are the concerns with the proposed significant expansion of the OSC's preservation order powers or any part of the proposal? Would commenters think some parts of the proposal are too far-reaching and should be scaled back or removed from the proposal? For example, should certain types of assets, such as real property or vehicles, be excluded from the proposal to give the OSC power to order the disposal of frozen assets to retain value prior to a hearing or any monetary sanctions being ordered? Should certain transfers to third parties or family members below fair market value be excluded, such as transfers made for legitimate tax or estate planning purposes? In what circumstances should a person affected by a preservation order be able apply to the OSC to have it revoked?

b. The Taskforce proposes limiting access to drivers' licences and licence plates for monetary sanctions owing to the OSC

The Taskforce proposes that Ontario would 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 to strongly incentivize payment and increase the OSC's sanction collection rates.

What are the concerns commenters would have with the proposal to limit access to drivers' licences and licence plates? Would this proposal be an appropriate way to incentivize payment?

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

There are 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 that profit from falling share prices or as “pump and dump” schemes that profit from increasing share prices. The advent of technology in recent years has changed the nature and tactics of these schemes such that they can now easily have a wider audience and sustained campaigns with many misleading or false messages or statements over a prolonged period of time e.g., on social media using multiple tweets. British Columbia recently enacted legislation that will help combat such abusive schemes.

Discussion:

The Taskforce proposes creating a new and specific prohibition on making misleading or untrue statements about public companies to 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.

What concerns would commenters have with this proposal? How can we ensure that the proposed prohibition does not inadvertently capture analysts who provide their researched views on reporting issuers’ securities or reputable activist short sellers whose public comments can be important for price correction of a public issuer’s securities?

37. Increase the maximum for administrative monetary penalties to \$5 million

After holding a hearing, 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.

Discussion:

The Taskforce proposes increasing the maximum sanction to \$5 million to modernize the *Securities Act* by adjusting for inflation and scale of Ontario business, aligning with similar SRO sanctions for similar breaches, and more effectively deterring or penalizing misconduct for larger firms or more egregious conduct.

Would commenters think that such a significant increase to the maximum for administrative monetary penalties is appropriate? What are the potential concerns with such an increase? Should

the maximum amount differentiate between firms and individuals? Should there be differentiation for certain types of infractions (for example, in the U.S., certain maximum penalties are higher for “intentional or knowing conduct” or “repeated instances of negligent conduct”)? How should the enforcement monies collected by the OSC be used to both protect investors and foster capital formation and competition? Should monetary penalties for firms be determined in proportion with the revenue of the firm?

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

To enhance investor protection, the OSC’s investigative teams need modernized tools to obtain necessary documents and data to combat white collar crime and other breaches of Ontario securities law. Enforcement investigations require tools to be effective in the digital age where businesses and individuals predominantly have documents and data stored on servers in the “cloud.” British Columbia recently enacted legislation that will help address these investigation challenges.

Discussion:

The Taskforce proposes that OSC enforcement investigators should have a clear power to compel any firms and individuals (via summonses in administrative investigations), as well as firms and individuals that are not targets of investigations (via production orders in quasi-criminal investigations), to “find and gather” and “prepare and produce” relevant documents, records, or electronic data to deliver to the authorized OSC investigator in the form and within the timeframe requested by the investigator (where those firms and individuals have possession or control of that information or data).

Having production order powers available in the securities context will align the investigative tools available to investigators for both quasi-criminal and *Criminal Code of Canada* investigations. Similarly, enhancing the compulsion powers in s. 13 of the *Securities Act* will align the investigative tools available to investigators for both administrative and quasi-criminal investigations. These powers will provide the OSC with impactful ways to advance investigations.

In respect of production orders, a person that is served with a production order must produce a required document even if production may tend to incriminate that person or subject that person to a proceeding or penalty. However, the evidence that is produced via this production order 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.

What are the potential concerns with either of these significant changes to the OSC’s investigation powers of granting the OSC production order powers or enhancing the OSC’s current compulsion powers? How can these concerns be mitigated? What safeguards or limits should be put in place as part of the OSC’s use of these proposed expanded investigation powers?

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

The Taskforce has heard from stakeholders that there is not a clear process for the adjudication of disagreements and disputes arising in the course of the OSC's investigations and examinations. The Taskforce has also heard that persons or companies subject to OSC summonses would benefit from more transparency about the entire process.

Discussion:

The Taskforce proposes greater statutory rights for persons or companies directly affected by an OSC investigation or examination. Such persons or companies should be able to apply to an OSC adjudicator for clarification of orders relating to investigations or examinations and possibly summonses.

What are the concerns with such a proposal? Is there a risk that such a proposal would permit the subject of an investigation to participate in determining how the regulator can gather information or what witnesses the regulator may examine? What potential impact would this proposal have on the OSC's ability to conduct joint investigations or otherwise cooperate with Canadian and international regulatory partners? Would this unduly delay investigations and examinations? Should this apply both to summonses and to investigation and examination orders? Should the proposed OSC adjudicator clarification power include both the power to vary or to revoke the orders or the summonses?

The Taskforce also proposes that persons or companies subject to OSC summonses have more transparency about the entire process. The Taskforce understands that it is OSC staff's practice to provide notice to persons or companies that have been the subject of an investigation when the investigation is closed and, as a part of a new pilot program, to facilitate an examination by providing certain documents to the persons served with a summons.

What are commenters' views on the following practices and proposals for procedural changes?

- Should any changes be made to the process for providing notice to those who were served with an OSC summons when an investigation (or a defined subset of it) has been concluded?
- Should certain documents be provided to persons served with a summons to attend for an oral examination to facilitate the examination?
- Should there be an opportunity for persons and companies served with a summons to comply by initially producing a subset of responsive documents and to meet and confer with OSC Staff, with a view to attempting to refine or expedite the required production and timeline for production?

40. Address concerns regarding the OSC's use of contempt proceedings related to investigations and potential creation of offences for obstruction, including non-compliance with a summons

Stakeholders have brought to the attention of the Taskforce that they are concerned with the OSC's use of contempt proceedings as part of its investigations. There should be a reasonable opportunity for market participants to contest the possible use of contempt proceedings when attempting in good faith to engage in the investigation process. One reason for the OSC's use of contempt proceedings relating to investigations is the absence in Ontario of an obstruction offence under the *Securities Act*, while such offences exist in the capital markets legislation of other provinces.

A related proposal being considered by the Taskforce is to add offences for obstruction and non-compliance with a summons to the *Securities Act* so that the OSC would have additional tools other than contempt proceedings to address cooperation issues in investigations.

Discussion:

The Taskforce proposes that OSC Staff be required to obtain leave from the OSC tribunal before it is allowed to initiate contempt proceedings related to investigations. The Taskforce is also seeking feedback from commenters on the proposal to add an obstruction and a non-compliance with a summons offence to the *Securities Act*.

What are the concerns with such proposals? Currently OSC Staff exercise prosecutorial discretion to enforce a summons by bringing a contempt application to the Superior Court. Should that discretion be limited by requiring OSC Staff to obtain leave from the tribunal first? Should the proposed requirement to obtain leave to initiate contempt proceedings be done in proceedings that are closed to the public? Should the *Securities Act* be amended to create new offences for obstruction and non-compliance with a summons? If so, are there any benchmarks or parameters that should be engaged to ensure that a reasonable time is given for complying with a summons?

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

Generally, a person or company shall not disclose the content of an investigation or examination order or a summons 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.

Discussion:

The Taskforce proposes to incorporate additional confidentiality exceptions in the *Securities Act* 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.

Would commenters consider the expansion of confidentiality and disclosure exceptions to be appropriate? Please provide feedback on who these exceptions should cover — the Taskforce would appreciate your views in particular about providing exceptions for disclosure of an investigation order or a summons served by the OSC to a company or an employee at a company to: (a) a prudential financial regulatory authority such as the Office of the Superintendent of Financial Institutions and equivalent regulators, (b) an expanded list of counsel where it would facilitate responses to investigation requests and summonses, (c) any person where the disclosure is necessary to comply with requests from OSC Staff or for sound corporate governance, such as the company’s internal compliance and governance officers, or (d) the company’s board of directors and senior management.

42. Ensure proportionality for responses to OSC investigations

Given the potential burden imposed by OSC investigations, some stakeholders have indicated that there is a need to ensure that questions and requests for documents are subject to a reasonable or proportional threshold.

Discussion:

The Taskforce has heard from stakeholders that it is important that some limits apply to the response to the OSC’s investigations and examinations. The Taskforce proposes statutory amendments or other mechanisms to ensure that there is a reasonable or proportional threshold applicable to responses provided in investigations and examinations. One possibility is a statutory amendment providing that there is a “reasonable and proportionate” threshold to examination and inspection of documents or other things in investigations and examinations.

What is the best way to introduce proportionality for responses to OSC investigations? What would be the concerns with proceeding with a statutory amendment and what other mechanisms could be considered? The Taskforce understands that OSC Staff are currently developing data delivery standards. What features would provide fairness in data requests?

43. Clarify that requiring production of privileged documentation is not allowed

Under common law, respondents always have the right to not produce documents that are privileged, 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.

Discussion:

The Taskforce proposes to add language to the *Securities Act* to specify that privileged documents must not be required to be produced during OSC investigations or examinations. On occasions where there is a challenge to the assertion of privilege, the Taskforce proposes that OSC procedures be modified to require immediate production of a privilege log. This could include the date, author, recipient and nature of the document, the subjects it covers, and the specific basis for claiming privilege.

Please provide feedback on any challenges or concerns you may have.

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

The Taskforce understands that the OSC has a longstanding process of providing notice to respondents that OSC Staff recommend initiating administrative proceedings. Currently the notice provision is two weeks. This notice ensures that, after an investigation, the OSC reach out to the respondent to discuss any infractions uncovered before initiating administrative enforcement proceedings. Stakeholders have raised the need to have discussions with OSC Staff about their concerns and a potential resolution prior to this notice.

Discussion:

The Taskforce proposes a procedural change whereby the OSC will invite respondents to discuss alleged infractions and a potential resolution with OSC staff at least three weeks before it delivers a notice that OSC staff will be initiating administrative enforcement proceedings.

What are the concerns with this proposal?

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

The Taskforce has heard that certain parties under investigation by the OSC want to move towards a prompt resolution but may be practically impeded because of the existence of civil liability, including in class actions. Apart from no-contest settlements, OSC-approved settlement orders require admissions to be made. These admissions may be relied upon in subsequent civil proceedings, and it is possible that the substance of settlement discussions may be producible in civil lawsuits. Many parties view these risks and duties to stakeholders to more than offset incentives to resolve OSC proceedings promptly through cooperation. This may force investigated parties to conclude that they must await the resolution of related civil actions before meaningful engagement towards a resolution can occur. Further, privacy protection requirements may cause parties to be reluctant to voluntarily provide OSC Staff with certain information which may be required to drive towards a resolution without adequate protection from third party liability for doing so in good faith.

Discussion:

Reaching a resolution on enforcement matters is often in the best interests of both OSC Staff and significant market participants which have ongoing and continuous dealings with the OSC and need to demonstrate that they are generally compliant and abide by securities law, but may have been involved with isolated activities that are under scrutiny.

The Taskforce proposes the development of statutory provisions that ensure the confidentiality of dialogue between OSC Staff and parties under investigation, and protect investigated parties from liability for admissions made to the OSC in settlements and from liability for disclosing privacy-protected information to the OSC in the context of an investigation. Such protection from liability would prevent the use of admissions in class actions and other civil actions against the person who made the admissions. It would also restrict possible recourses for persons who are affected by the communication of their privacy-protected information to the OSC in the context of an investigation.

What are the potential concerns with such provisions? What limits or exceptions should be considered when developing these statutory provisions? What are the implications for investors of restricting the use of admissions? Do civil lawsuits, including class actions, complement regulatory proceedings to achieve investor redress and deterrence? Please comment on pertinent freedom of information and privacy implications that should be considered.

Enhancing Investor Protection

46. Require that amounts collected by the OSC pursuant to disgorgement orders be deposited into court for distribution to harmed investors in cases where direct financial harm to investors is provable

A statutory process to support the distribution of disgorged funds to harmed investors is important for investor protection in Ontario and is vital to the trust and confidence people have in the capital markets and in the OSC's enforcement capabilities. 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 test cases.

Discussion:

The Taskforce proposes 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 harm. 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.

The proposed model would apply to disgorgement amounts that are collected by the OSC only. It would not contemplate distribution of administrative penalties or voluntary payments to investors, which would continue to be allocated to third parties or used for other purposes authorized under the *Securities Act*.

What are the commenter's views about what the process should look like? For example, how can the process balance efficiency with fairness to individual claimants? What process should be used to resolve disputed claims? What criteria should the OSC use to determine when a receiver would be appointed or what amounts are too small to distribute to investors? How should the OSC communicate information relating to potential distributions?

47. Give the power to designated dispute resolution services organizations, such as the Ombudsman for Banking Services and Investments (OBSI), to issue binding decisions ordering a registered firm to pay compensation to harmed investors, and increase the limit on OBSI's compensation recommendations

In light of the ongoing COVID-19 pandemic, it is becoming even more necessary to implement a regulatory framework that protects everyday retail investors by enhancing the powers of dispute resolution services in Ontario, such as OBSI, by making their recommendations binding. Currently, after OBSI has investigated a complaint from a harmed investor, it conducts necessary analysis consistent with OBSI's loss calculation policies and, where warranted, makes a recommendation for compensation. However, registered firms that have harmed retail investors sometimes refuse to follow OBSI's recommendations or offer settlements that fall below OBSI's recommendations. 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. There are several comparable jurisdictions that already provide a framework for investor redress through a binding ombudsman scheme, notably those in the U.K. and Australia.

The OBSI \$350,000 limit on compensation recommendations has not been increased in many years and is not adjusted for inflation.

Discussion:

The Taskforce proposes creating a regulatory framework that allows for the designation by the OSC of a dispute resolution service, such as OBSI, and makes the dispute resolution service's decisions binding on a registered firm, if the harmed investor accepts the recommendation. The OSC would implement and oversee a comprehensive oversight regime for designated dispute resolution services and ensure necessary changes are made to the designated dispute resolution services' processes to provide procedural fairness for registered firms and investors.

The proposal would also require the development by the designated dispute resolution service of an independent internal appeals process. There would be no appeal to the OSC. Parties to a potential judicial review proceeding of an OBSI decision would be the registered firm and OBSI.

Such a framework to provide redress to harmed investors, in particular retail investors that have been harmed and lost an amount too low to consider a court action, would increase investor confidence in the capital markets by assuring that investors are compensated, when warranted, for financial losses that relate to the trading or advising activity of a registered firm.

Would commenters think that the proposal to give a designated dispute resolution services organization the power to issue binding decisions is appropriate? Are there other proposals that the Taskforce could consider to ensure retail investors who have been harmed and lost an amount too low to consider a court action are compensated?

Do commenters consider OBSI to be suitably equipped to make binding decisions on complex capital markets matters, specifically on exempt market issues? What structural or governance requirements should the OSC impose on OBSI as part of the designation process?

What should the maximum binding compensation amount per misconduct potentially imposed on a registered firm be considering that the objective is to provide compensation to retail investors who lost smaller amounts? Would there need to be a mechanism in place to avoid the risk that registered firms may be penalized more than once for the same misconduct if they are required to make a binding payment and are also subject to enforcement proceedings by the OSC or SROs?

The Taskforce also proposes a one-time increase of the limit on OBSI's compensation recommendations to \$500,000 with subsequent increases every two years based on a cost of living adjustment calculation. For greater certainty, this proposal is separate from the proposal to provide the binding decision-making power to dispute resolution services organizations.

Would commenters support such an increase to the limit on compensation recommendations?

Part 3: Path Forward

3.1 Process for Making Submissions

Written submissions addressing the questions in this consultation paper should be provided in electronic format (preferably Word or PDF) by email to CMM.Taskforce@ontario.ca. We would also welcome views from commenters on issues not reflected in the consultation paper.

Please use subject line: Consultation — Modernizing Ontario’s Capital Markets.

Submissions must be received on or prior to September 7, 2020.

Please note that information submitted may be subject to disclosure under the *Freedom of Information and Protection of Privacy Act*. Please do not submit personal information or specific identifying details of individuals, companies or other entities unless the specific information is already publicly available. Please also note that the submissions may be publicly posted on the Ministry of Finance website. Please do not forward confidential information that you would not want to be made public.

The feedback received will be used to inform the Taskforce’s final report to the Minister of Finance.

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 endeavours, Mr. Soliman is a board member of the Toronto SickKids Hospital Foundation.

Rupert Duchesne, former CEO and Director of Aimia

Rupert Duchesne retired in 2017 from Aimia Inc., where he was the founding CEO and a Director. Mr. Duchesne previously held officer positions at Air Canada, and in consulting. He is a board member of Mattamy Homes Inc., the Art Gallery of Ontario, the Luminato Festival, and the International Festival of Authors, and previously Alliance Atlantis and the Brain Canada Foundation. He is on the National Council of the C.D. Howe Institute. He is 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 & Founder of Kingsdale Advisors, he has been named one of Canada's most powerful business people. He is also the owner of QM Environmental, Titan Supply, and Harbor Club hotel. In 2009, he was recognized with the Ernst & Young Entrepreneur of the Year award for Ontario, Canada. Mr. Hall is currently a director of SickKids Foundation and a board member of Pathways to Education and Toronto International Film Festival. In 2015, he was the recipient of the Vice Chancellor's Award and in 2017 he received an honorary doctorate, both from the University of the West Indies.

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

Melissa Kennedy leads Sun Life's legal, compliance, and government relations functions, is a member of the company's most senior Executive Team, and the Executive Sponsor of Sustainability. Ms. Kennedy also chairs the boards of Sun Life's Canadian and US asset management companies. Before joining Sun Life, she was previously SVP General Counsel for 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 the province's Technical Advisory Group on Retirement Security. She currently serves on the boards of the Asia Pacific Foundation; the Association of Corporate Counsel; and in 2020 was appointed as an expert advisor to the 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.