

# Bold, broad-sweeping reforms proposed by Ontario's Capital Markets Modernization Taskforce

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Ontario's Capital Markets Modernization Taskforce, established by the provincial government in February 2020, has published its initial report<sup>1</sup>. Guided by the goals of modernizing the regulatory framework and making Ontario's capital markets more attractive globally, the Taskforce is soliciting feedback on 47 "high-impact" proposals. Submissions are requested by September 7. The Taskforce intends to deliver its final recommendations to the Minister of Finance by the end of 2020.

Many of the Taskforce's proposals are bold and innovative, covering a range of topics from enhanced capital raising activities and market access to regulatory structure reforms. The proposals also vary in character—many are driven at reducing regulatory burden, while others would bring significant government intervention in commercial and governance practices for market participants. The report only makes passing reference to harmonization across Canada—in order to avoid the development of conflicting and potentially more costly regimes, ensuring any new proposals are harmonized across all major Canadian jurisdictions will be critical.

A summary of some of the most notable proposals are highlighted below.

## Capital-raising reforms

- **Introduce an alternative public offering model.** Introduce a new public offering model as an alternative to the prospectus regime that would allow issuers who have been reporting for a minimum period of time (such as 12 months) to offer freely tradeable securities of a listed class, subject to an annual limit, through a streamlined disclosure document.
- **Develop a well-known seasoned issuer model (WKSI).** Make capital raising more cost-efficient for large issuers who meet certain prescribed thresholds (known as a WKSI), by allowing these issuers to file a shelf prospectus that is automatically effective with no regulatory review (similar to the U.S.).
- **Liberalize the testing-the-waters regime.** Make it easier for reporting issuers to pre-market public offerings to institutional accredited investors prior to the filing of a prospectus (consistent with recently liberalized testing-the-waters rules adopted in the U.S.).

- **Prohibit short selling in advance of prospectus offerings and private placements.** To combat aggressive short selling practices that sometimes occur in advance of public offerings and private placements (which are designed to depress share prices prior to pricing), adopt a rule prohibiting market participants from acquiring securities in an offering if they have made short sales of the same type of securities in a period ahead of the offering.
- **Eliminate the four-month hold period for securities sold to accredited investors.** In recognition that accredited investors are sophisticated and hold periods adversely impact liquidity, eliminate the current four-month hold period for securities sold to accredited investors on a private placement basis (provided that the issuer has been a reporting issuer for at least four months).
- **Expand accredited investor definition based on proficiency.** Allow issuers to privately place securities to a broader group of sophisticated investors by expanding the accredited investor definition to include individuals who have completed certain proficiency requirements, such as the Canadian Securities Course Exam, the Exempt Market Products Exam and the CFA Charter.
- **Allow an increased role for exempt market dealers (EMDs).** To open up additional channels of financing to issuers, particularly venture issuers, permit EMDs to act as selling group members in prospectus offerings and sponsors in RTOs.
- **Restrict the bundling of underwriting and commercial lending services.** To combat practices that are perceived to harm independent investment dealers and conflict with the delivery of independent advice to issuers, prohibit registered dealers from providing capital markets advisory/underwriting services under certain types of exclusivity arrangements with an issuer. Also under consideration is a blanket prohibition on the provision of capital markets advisory/underwriting services by registered dealers whose affiliates are commercial lenders to the issuer.
- **Increase access to shelf system for independent products.** To ensure that investors have equal access to a broad range of products, prohibit bank-owned dealers from offering proprietary-only shelves by requiring them to include independent products on their shelves if requested, and report on the percentage of proprietary versus independent products offered or sold on a quarterly basis. The Taskforce also suggests that while bank-owned dealers may be permitted to exclude independent products that are reasonably determined to be unsuitable, independent manufacturers should be able to challenge these determinations by raising them with the relevant SRO.

## Corporate governance and proxy-related reforms

- **Mandate the adoption of diversity targets and director term limits.** Require TSX-listed companies to set targets and disclose annual data on the representation of women, black people, Indigenous people, and people of colour (BIPOC) on boards and in executive officer positions. The Taskforce requests input on the appropriate threshold for such targets, including in particular whether a target of 40% for the representation of women and 20% for the representation of BIPOC with a 3-5 year timeline for achievement would be appropriate. To encourage board renewal, set a 10-year maximum tenure limit for directors, with an allowance that 10% of the board can exceed the maximum for up to two years.
- **Reduce early warning reporting threshold to 5% and mandate quarterly reporting by institutional investors.** Consistent with thresholds applicable in the U.S., and in light of increased shareholder activism, reduce the early warning reporting threshold from 10% to 5%. Additionally, require quarterly reporting of holdings by institutional investors who own securities of a reporting issuer above a specified dollar threshold.
- **Eliminate non-objecting and objecting beneficial owner status.** Eliminate NOBO/OBO status and allow issuers to access a list of all beneficial owners of their securities.

- **Regulate proxy advisory firms (PAFs).** Provide issuers with a right to rebut PAF reports, require PAFs to include issuer rebuttals in their reports and address conflicts of interest that arise when PAFs provide both consulting services and voting recommendations with respect to issuers.
- **Universal proxy ballots for contested meetings.** Require the use of universal proxy ballots (i.e., a single ballot that lists the director nominees of each side of a dispute and allows a shareholder to vote for a combination of nominees) for contested meetings where one party elects to use a universal ballot.
- **Prohibit misleading or untrue statements.** Adopt a new rule prohibiting the making of misleading or untrue statements, in part to deter and combat short and distort campaigns.
- **Empower the Ontario Securities Commission (OSC) to provide no-action letters.** To reduce litigation and streamline the shareholder proposal process, empower the OSC to provide its view to issuers seeking to exclude shareholder proposals through the issuance of a no-action letter (like the U.S.).

## Continuous disclosure reforms

- **Consider benefits of semi-annual reporting.** Consider the adoption of a semi-annual financial reporting regime, particularly for smaller issuers with limited resources who may not experience significant financial and operational changes on a quarterly basis.
- **Consolidate and reduce reporting requirements.** Streamline outdated, costly and duplicative public reporting requirements, including by combining the form requirements for an annual information form, management’s discussion & analysis (MD&A) and financial statements, and simplifying the content of the business acquisition report (BAR). Consider also raising the BAR significance tests so that fewer acquisitions are deemed significant.
- **Require enhanced environmental, social and governance (ESG) disclosure.** Require TSX-listed issuers to provide enhanced disclosure of ESG information, compliant with either or both of the Sustainability Accounting Standards Board framework and the Taskforce on Climate-Related Financial Disclosures recommendations.
- **Adopt access equals delivery model for disclosure documents.** Transition towards an access equals delivery model of dissemination of information which could apply to prospectuses and periodic continuous disclosure documents such as annual information forms, financial statements and MD&A.

## Enforcement-related reforms

- **Broaden the OSC’s enforcement, investigation and collection tools.** Consistent with powers recently granted to the British Columbia Securities Commission:
  - broaden the OSC’s public interest remedies in control contests and similar transactions, including by granting powers to rescind a transaction, require disposition of securities and prohibit the exercise of voting rights;
  - provide the OSC enhanced investigative powers to compel the production of information, subject to the non-disclosure of privileged information and protection of parties from liability for admissions made to the OSC;
  - provide the OSC with additional tools to collect monetary sanctions, including through enhanced powers to freeze, seize and dispose of assets and prohibiting the issuance or renewal of drivers’ licenses; and
  - increase the monetary penalties for each breach of securities laws from \$1 million to \$5 million.
- **Emphasis on proportionality.** Develop “limits” applicable to responses to OSC investigations and examinations, such as a statutory proportionality threshold.

- **Broadened ability to disclose investigations internally.** Permit the internal disclosure of orders and summons under expanded circumstances to reduce the regulatory burden associated with seeking permission to disclose.

## Structural reforms

- **Expand OSC mandate.** Expand the mandate of the OSC to include fostering capital formation and competition in the markets, reflecting a public policy imperative of growing the capital markets in Ontario.
- **Bifurcate the regulatory and adjudicative functions of the OSC.** Bifurcate the regulatory and administrative functions of the OSC through the creation of a separate tribunal, comprised of adjudicators and its own staff, either within the existing OSC structure or as a new separate entity.
- **Revisit governance and structure of the IIROC and the MFDA.** Give the OSC increased oversight over the IIROC and the MFDA. Consider consolidation of the IIROC and the MFDA into a single organization that would exclusively regulate all dealer and advisory firms, including investment dealers, mutual fund dealers, portfolio managers, exempt market dealers

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<sup>1</sup> A link to the full report is available [here](#).

*To discuss these issues, please contact the author(s).*

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