IIACACCVM
INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

TD West Tower | 100 Wellington Street West
Suite 1910, PO Box 173 | Toronto, ON M5K 1H6

416.364.2754 | www.iiac.ca

www.iiac.ca

Ian C.W. Russell FCSI
President & Chief Executive Officer

September 10, 2020

VIA EMAIL: CMM.Taskforce@ontario.ca

Dear Mr. Soliman:

Re: Capital Markets Modernization Taskforce Consultation Report (the "Consultation Report")

On behalf our 115 IIROC regulated investment dealer member firms—small regional firms as well as large national firms—the IIAC welcomes the opportunity to provide comments on the Capital Markets Modernization Taskforce (the "Taskforce") Consultation Report, and appreciates the Taskforce considering our input through the initial consultations.

Our members are the key intermediaries in Canadian capital markets, account for the vast majority of financial advisory services, securities trading and underwriting in public and private markets for governments and corporations. The IIAC provides leadership for the Canadian securities industry with a commitment to a vibrant, prosperous investment industry driven by strong and efficient capital markets. We applaud the Taskforce's commitment to eliminate unnecessary, duplicative and burdensome rules and processes while protecting investors and the integrity of our capital markets.

The IIAC formed numerous working groups to examine and provide detailed feedback on the majority Taskforce's 47 policy proposals, particularly those most relevant and applicable to our industry and where a clear industry position could be established. Our comments are set out in below.

Improving Regulatory Structure

<u>Ontario Securities Commission ("OSC") Governance</u>

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

The IIAC has no comments on this proposal.

2. **Separate regulatory and adjudicative functions at the OSC**

The IIAC supports the proposal to separate the OSC's regulatory and adjudicative functions. Two potential models are proposed in the Consultation Report: (1) a separate tribunal reporting to the OSC Board, and (2) a separate tribunal reporting to the Minister of Finance. In the IIAC's view, the first model proposed does not adequately address the concerns, which have been the source of criticism of the current model (i.e. the appearance of lack of independence and impartiality between rule-making and adjudicative functions); the second model is, therefore, preferred. Consideration should be given to mandating that the tribunal report to the Minister of the Attorney General to reinforce the separation and independence from the OSC.

The new independent adjudicative tribunal should hear and decide all contested matters (enforcement, M&A, registration disputes, hearings and reviews from Self-Regulatory Organizations ("SROs")), as the same concerns about independence and rule-making/adjudicative boundaries apply equally in all contested hearings.

Self-Regulatory Organizations

3. **Strengthen the SRO accountability framework through increased OSC oversight**

Proposals related to the SROs Recognition Order

The IIAC is pleased the Taskforce recognizes the vital role of SROs to the growth of Ontario's capital markets and economy, and investor protection in the province. The IIAC is of the view that the expertise, responsiveness, and innovation in rulemaking and enforcement are a result of the direct relationship between the SRO, the securities industry, and dealer registrants. The Taskforce has made a salient point that the SROs reduce fragmentation of domestic securities markets through a national rulebook.

The IIAC agrees with the Taskforce that the SRO governance and oversight framework should be restructured to align better with the public interest and enable greater stakeholder input. The SRO should be required to solicit stakeholder feedback when developing strategic and regulatory priorities. Additionally, to be accountable, the SRO should be required at year-end to provide results against objectives in its annual business plan.

The OSC already has, in effect, a veto on IIROC rules through the approval process outlined in the current recognition order. The Taskforce's recommendation would expand the OSC's reach by including rule interpretations and guidance as subject to veto. The IIAC believes this oversight by the OSC can be beneficial by providing an objective review of the publications. For example, the OSC could ensure guidance is not unintentionally resulting in new requirements for firms and bypassing the proper rulemaking process. Nevertheless, it is imperative that the SROs are able to remain adaptive in their rulemaking, to progressively respond to changing technology requirements and market conditions. Further, it is important for investor protection initiatives that an expansion of the veto process does not cause undue delays in the rule approval process. We recommend that the OSC be required to exercise any rulemaking related vetoes within a pre-determined period of time to avoid unnecessary delays and confusion.

The Taskforce has also recommended OSC veto power over key appointments including the Chair, President, and CEO of the SRO, as well as term limits for appointments. There should be clear parameters through which the OSC is entitled to exercise its veto. If the OSC exercises a veto, the reasons to reject a candidate, and intervene in the candidate search process, should be made clear and transparent in public, to ensure that the decision to reject candidates is made carefully, avoiding unneeded disruptions to candidate searches.

Proposals related to the SROs' Boards of Directors

The IIAC believes the composition of an SRO Board of Directors ("Board") is critical for the effective execution of the responsibilities of the SRO. A broad representation of member firms will enable the SRO Board to respond effectively to the evolving financial landscape and serve the public interest. The IIAC also recognizes that the Board members should reflect the wide diversity in capital markets, as well as the importance of independent directors to provide additional perspectives. It is also crucial to recognize that a strong industry voice is needed on the Board to ensure the SRO is relevant and effective.

The IIAC supports the Taskforce's recommendation to have the Canadian Securities Administrators ("CSA") appoint up to half of the directors on the SRO Board, however, we note there may be practical difficulties, provoking disagreements and delays in appointments to the Board. The SRO and the CSA must agree on the criteria for Board selection for independent and non-independent directors of the Board.

We agree with the recommendation to introduce a suitable cooling-off period for individuals to qualify as independent directors when they have left the financial industry. It is instructive that IIROC recently announced expanded criteria for independent director positions, enabling individuals with direct experience with consumer and retail investor issues to apply.

The IIAC strongly opposes the recommendation to reduce the representation of industry members on the Board of Directors from the existing *even* distribution between independent and non-independent (industry) directors, to a lesser proportion. In particular, this recommendation will seriously aggravate an already inadequate level of industry representation on the IIROC Board. At present, there are seven independent directors, two non-independent directors representing the marketplaces (stock exchanges), and only five directors representing IIROC firms. The Taskforce recommendations would result in even less than five industry Board members, chosen from an increasingly diversified industry with many different business operations, regional locations, and business models. Many IIAC member firms are already concerned that they may not have direct representation at the Board of Directors level. Given the planned consolidation of the SROs with the additional categories of mutual fund dealers and CSA registrants, there could be a worrisome loss of industry voice on the SRO Board of Directors.

We believe the other proposed recommendations related to the introduction of a cooling-off period, the OSC veto for the Chair of the SRO, IIROC's expanded independent director position criteria, and maintaining equal representation of independent and non-independent Board members, will ensure proper representation and enable a variety of voices to participate on the SRO Boards of Directors without unduly diluting critical industry perspectives.

Proposals related to the proposed Ombudsperson service for SROs

The IIAC believes that the creation of an ombudsperson service for SRO member firms is unnecessary. It could add administrative burdens, delays and costs to member firms without clear benefits. There are existing channels within IIROC through which a member firm can escalate complaints with respect to procedural issues during audits or enforcement matters.

If there are concerns related to procedural fairness, expectations may be better managed through improvements to governance structures within the SRO. For example, the ability to escalate matters to the SRO's Board of Directors can be made more clear, and the codes of conduct for SRO staff enhanced.

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**

The IIAC strongly supports the Taskforce's proposal to consolidate advisory firms within a single SRO. It has been clear for some time that there is a pressing need to realign the regulatory structure to create an SRO that is adaptable to the evolving needs of clients and the financial markets. Regulation should be reflective of a client's needs and their desire for "one-stop access" to financial services and should not be based on transactions or products.

The IIAC fully agrees with the Taskforce that a phased approach is the optimal way to achieve comprehensive consolidation of the SRO system. This proposal would limit regulatory inertia and achieve an IIROC-MFDA merger in the short-term, with regulatory efficiencies and better governance, followed by consideration of a broader SRO expansion embracing all registrants. This approach will provide the opportunity for stakeholders to examine and improve the rulebook, governance structures, and enforcement practices.

We expect that the consolidation of IIROC and the MFDA would achieve immediate efficiency gains and cost savings, thereby allowing the investment industry to dedicate additional resources to client service and product innovation, while causing minimal disruption to clients. Under the consolidated framework, dual platform firms expect to have the flexibility to reduce duplicative compliance and operating structures. Consolidation could improve investor protection by achieving a common culture across the regulatory entities for greater consistency in compliance practices and enforcement obligations.

A consolidated SRO can conduct broad investor outreach to enhance its visibility and ensure clients understand the public interest benefits that an SRO provides. Potential measures taken during the consolidation process to strengthen governance structures and review rules and the enforcement process are expected to enhance public confidence in our capital markets.

Further, the IIAC concurs with the Taskforce recommendation to retain surveillance responsibilities within the SRO. Surveillance responsibilities have been discharged by IIROC responsibly and effectively, as evidenced by IIROC's performance during the recent and unprecedented market volatility. Importantly, the surveillance function has transformed IIROC into a more robust regulator, providing it with insights on investor behaviour and understanding of capital market trends.

The IIAC believes additional regulatory and operating efficiencies can be realized if OSC advisory firms were incorporated into the consolidated SRO. Some IIAC member firms believe the removal of regulatory barriers could stimulate innovative business processes and business restructurings for a wider range of products and services. Further, this phase of consolidation could improve client protections by providing direct oversight between the additional firms and the SRO. SRO consolidation would remove the possibility of arbitrage among advisory firms governed by different regulators.

However, the IIAC recognizes the increased complexity in potentially migrating portfolio managers ("PMs"), exempt market dealers ("EMDs"), and scholarship plan dealers into an SRO model, given the significant differences in their business models and current rule structures. Consideration must be given to how the rules and regimes governing these registrants can be carried over into the consolidated SRO, to minimize disruption and to avoid any added regulatory burden.

Given the diversity of SRO registrants, harmonization should not be equated with uniformity in how rules are designed and enforced. Different regulatory approaches are required for different business models, and a number of factors should be considered, including risk levels and the nature of the relationship with clients. Efficiencies can be realized by tailoring regulation to the relationship. Sophisticated or institutional clients may not benefit from the same regulatory requirements as retail clients. A one-size-fits-all model should, therefore, be avoided to take into consideration investors' different needs. This would not result in lower protections for clients, but allow multiple ways for a requirement to be satisfied.

While the SRO consolidation process will be complicated, it should not deter progress, in particular, with respect to phase one of the consolidation between IIROC and the MFDA. For example, as we noted above, separate rulebooks and regimes could continue for an interim period after consolidation. Further, the investor protection funds at both SROs could integrate gradually after consolidation. Finally, the different treatment of advisor incorporation should be harmonized between the SROs. Indeed, the CRA has established clear precedents for advisor incorporation under Canadian tax law.

Addressing the disadvantages of the current SRO framework requires immediate action. We are encouraged by the Taskforce's decisive proposals and ambitious timeline.

Regulation as a Competitive Advantage: Supporting Ontario's Issuers and Intermediary Market

<u>**Supporting Ontario's Issuers and Intermediary Market**</u>

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

The IIAC does not support the removal of the four-month restricted (or 'hold') period on securities issued under the accredited investor prospectus exemption. We are concerned that removing the hold period on such a widely utilized exemption would undermine the prospectus regime, as issuers will inevitably opt to undertake significantly more offerings using this exemption than they otherwise would have qualified with a prospectus. Allowing the issuance of freely tradeable securities on a large scale without being subject to the investor protection measures provided by underwriters' due diligence, and the improved disclosure and regulatory review afforded in a prospectus offering, significantly increases the risk of market fraud. More generally, it would result in a diminished use of the prospectus regime, and a diminished role for registered investment dealers. This is a critical concern because the prospectus regime is fundamental to eliciting quality disclosure in both the primary and secondary markets. In each case, the impact of removing the hold period would be a failure to provide appropriate safeguards for market integrity, significantly diminishing confidence in Canadian capital markets.

The purpose of the hold period is not to protect the initial investor in a private placement. Rather, the hold period is a resale condition intended to protect the market as a whole from the risks of allowing new freely trading securities to be issued without the rigorous vetting and improved disclosure that results from the prospectus process. As such, the sophistication of the initial (accredited) investor is not relevant to whether that investor should be permitted to trade the securities immediately following their purchase—sophistication only informs whether that initial investor is capable of making its own investment decision in the absence of the prospectus process.

Given our proximity and close ties to the U.S. securities market, it is also important that our securities distribution regulations provide similar protections, where appropriate, accounting for the smaller size of Canadian issuers and the market in general. Given that the U.S. imposes an even longer hold period on securities issued under their equivalent exemption, it is important to ensure that similar safeguards exist in Canada to ensure Canadian markets maintain their credibility and continue to inspire confidence from international investors and regulators.

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

The IIAC supports permitting (though not requiring) semi-annual reporting for venture issuers, but is concerned about the implications of moving to semi-annual reporting for non-venture issuers. We acknowledge the extra time and resources that are required for issuers to report on a quarterly basis, however, any change to a less frequent reporting cycle would be a departure from capital market best practices. Such a change could make the Canadian capital markets less attractive to global investors that are used to quarterly reporting that is typical in North America, South America and Asia.

Issuers benefit from the structured and frequent communication with investors that comes with the quarterly reporting cycle. In particular, many investors are fiduciaries responsible for managing capital on behalf of their clients and benefit from frequent interaction with investees that is facilitated by quarterly reporting. Moving to a less frequent reporting cycle would reduce the amount of information market participants have at their disposal to make investing decisions.

Although semi-annual reporting is not appropriate for senior issuers, it may be advantageous to provide smaller issuers, such as those listed on the TSXV or CSE, with the option of quarterly or semi-annual reporting. As fewer smaller companies are accessing public markets for capital, in part due to the reporting demands on time, costs and other resources, the increasing proportion of private versus public companies means investors have access to fewer public companies to invest in. Overall, moving from quarterly to semi-annual reporting should not significantly reduce the transparency of information, but hopefully convince more smaller companies to go public to access capital.

Given that a considerable number of smaller issuers are not generating revenue, they may be concerned with the higher costs that come with quarterly reporting. Granting these issuers an option to report on a semi-annual basis may provide cost benefits that would allow them to grow to a stage where it would be appropriate to adopt quarterly reporting, whether due to investor interest, or when they reach a stage where they are a candidate to graduate to a senior exchange.

Small issuers that opt to report on a semi-annual basis should, where otherwise eligible, continue to have access to the short-form prospectus system. However, in order to ensure that their disclosure meets the "full, true and plain" standard, they may, depending on their circumstances, be required to supplement their disclosure if more than a quarter has passed since their most recent financial statements, including any related Management Discussion & Analysis ("MD&A"). Alternatively, the reporting regime could require that issuers that wish to avail themselves of the short form prospectus system to include an interim financial statements (and associated MD&A) for a quarter, if the issuer would otherwise have been required to include interim quarterly financial information if it were reporting quarterly. However, in order to preserve the integrity and availability of the U.S. (or 'southbound') multi-jurisdictional disclosure system ("U.S. MJDS"), issuers filing a prospectus without the quarterly financial information that would otherwise be required to be included should not be able to have any prospectus cleared by Canadian securities regulators that purports to qualify securities that will be sold through U.S. MJDS.

7. Introduce an alternative offering model for reporting issuers

Creating an alternative offering model based on continuous disclosure rather than prospectus disclosure would have adverse consequences to the integrity of Canadian capital markets and investor confidence. Shifting the foundation of securities offerings from a prospectus-based model to a more continuous offering framework would have a significant adverse effect on the overall quality of continuous disclosure available to the secondary markets due to, among other things, an absence of underwriter due diligence and regulatory review. Also troubling with this proposal is its absence of prospectus remedies to protect small, retail investors most likely to participate in this type of offering, and its significant inconsistencies with U.S. securities legislation. Taken as a whole, the many adverse consequences of this proposal would significantly degrade the reputation of Canadian capital markets.

In addition to the adverse domestic implications to Canadian capital markets, it is important to consider how this proposal (and the other capital raising proposals in the Consultation Report) might affect the perspective of investors, analysts, regulators, and other market participants outside of Canada. It is reasonable to expect this proposal and proposal number five in the Consultation Report would adversely affect Canadian issuers' ability to raise capital in the U.S., as Canadian disclosure would be perceived to be lower quality. This perception may also imperil the availability of U.S. MJDS, as the U.S. Securities and Exchange Commission (the "SEC") may not regard Canadian continuous disclosure to be a sufficient replacement for equivalent U.S. reporting. It would be a significant blow to Canadian issuers if they were to lose access to the U.S. securities markets, by virtue of changes to U.S. MJDS or otherwise.

Rather than create an alternative offering model to the prospectus regime, we suggest that Canadian securities regulators continue to pursue ways to better streamline and reduce the burden in the existing prospectus regime, including through alternative prospectus offering models.

In connection with ongoing OSC and CSA burden reduction and modernization initiatives , the IIAC and other market participants have put forward several proposals. A prime example is the recent changes implemented to the At-the-Market ("ATM") rules, affording Canadian issuers (both large and small) a more efficient avenue to raise capital through the secondary market, while maintaining the fundamental features of the prospectus process that are critical to market integrity and investor protection. The impacts of these changes to the ATM rules, and any other alternative prospectus offering models should be analyzed before even considering public offering models that 'skip' the prospectus process and risk the confidence and integrity of our capital markets.

In addition, a system should be developed to facilitate the qualification of private placement securities by a subsequent receipt of a prospectus, which would remove the hold period on those exempt securities, but with wider applicability than the current special warrant process.

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**

The IIAC supports the introduction of provisions that would permit reporting issuers to take measures to gauge interest from investors for participation in potential prospectus offerings prior to filing a preliminary prospectus.

We advocate for the adoption of a robust "Testing-the-Waters" ("TTW") regime in Canada that, at a minimum, parallels the liberalization introduced by the SEC pursuant to the U.S. *JOBS Act* in September 2019. The adoption of the resulting Rule 163B and related amendments under the *U.S. Securities Act* to expanded the permitted use of TTW communications to all issuers regardless of size or reporting status. The new rule enables any issuer to make oral and written offers to qualified institutional buyers ("QIBs") and institutional accredited investors ("IAIs") before or after the filing of a registration statement to gauge investors' interest in an offering. This new rule is a much-anticipated development that encourages public capital formation. To facilitate cross-border offerings, any new TTW regime adopted by Canadian securities regulators should (i) permit Canadian issuers and/or dealers to operate in the same manner as would be permitted under Rule 163B in the United States, and (ii) clarify that marketing activities outside of Canadian jurisdictions are not regulated by Canadian securities laws except, and only to the extent that, such activities affect prospective investors in Canadian jurisdictions.

In the Canadian context, issuers and dealers should be able to gauge the interest of institutional investors (using the current IIROC definition of an Institutional Investor) prior to an offering regardless whether the offering is made through a shelf prospectus or a short-form prospectus (currently, once a receipt is issued for a preliminary shelf prospectus which includes a securities, solicitations of expressions of interest are permitted). If any of the information being shared with the investor constitutes an undisclosed material fact or material change (including the fact of the offering itself) then the investor should be appropriately wall-crossed with the investor being subject to typical confidentiality and restrictions from trade etc. Provided that all information shared with the investor is cleansed in the prospectus upon the announcement of the offering, the investor should be able to receive prospectus-qualified securities, regardless of the prospectus type. The OSC should reinforce such rules, relating to "tipping" and trading on undisclosed material information to ensure that that dealers, investors and issuers are well aware of these important protections.

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

The IIAC believes that the Canadian marketplace is well placed to adopt an access equals delivery model. Such a move would align current investor preferences with the Taskforce's objective of modernizing the way documents are made available and without compromising investor protection or shareholder engagement.

While the IIAC believes an access equals delivery model could provide the greatest efficiency and cost-savings, if it were to cover the broadest set of investor disclosure documents, accommodating the delivery of all possible documents would entail overcoming additional hurdles and complications, which would result in significant delay and potentially jeopardize the policy initiative. The IIAC has, therefore, advocated for a staged-implementation approach that focuses initially on access equals delivery for prospectuses, financial statements and MD&A. Narrowing the focus to these disclosures, along with the Management Report of Fund Performance, would result in some of the benefits of an access equals delivery model being realized sooner. Regulators should, however, continue to consult with market participants on how access equals delivery can eventually be applied to other documents required to be delivered under securities legislation and the complications that would need to be addressed related to these deliveries.

SEDAR should be the trusted repository for all investor disclosures and communications. Pointing investors to this single source would simplify processes for issuers while ensuring each document can be accessed easily by investors and in a similar fashion. The IIAC, therefore, recommends that issuers be required to post their documents and any accompanying news releases on SEDAR and be given the option (but not be required) to post on their website or any other digital communication channel(s) utilized by the issuer, such as social media. In the IIAC's view, it should be open to the issuer or dealers to use any means reasonable to disclose the availability of the relevant document to investors.

Another measure that the Taskforce should consider in promoting the digitization of capital markets is the elimination of physical security certificates. The current pandemic has illustrated how problematic the handling of physical security certificates can be during remote based operations. Though the financial industry, through its dematerialization efforts, has made great strides in reducing the number of physical security certificates being exchanged, there continues to be too many of these certificates issued by corporations and their agents. Any measures taken by the Taskforce to promote the electronic alternatives to physical certificates (e.g. Uncertificated Shares) would be welcomed.

10. Consolidating reporting and regulatory requirements

a. Combining the form requirements for the Annual Information Form ("AIF"), MD&A and financial statements

We are supportive of reducing quarterly MD&A requirements by permitting issuers to eliminate redundant information including items that are otherwise already included in the quarterly financial statements (financial instruments, commitments, etc.). The MD&A and the financial statements are meant to be reviewed in tandem. The relationship between these two documents makes it unnecessary to include items such as contractual obligations, outstanding share capital, accounting policies, etc. in both documents.

In addition, disclosure regarding financial and other instruments, related parties, critical accounting estimates and judgements, as well as future accounting pronouncements, should not be included in the MD&A to the extent it is already included in the financial statements.

Venture issuers that are not required to, and do not file an AIF should not be required to provide additional reporting in their MD&A disclosure beyond that which is currently required.

In addition, the ability to file a unified report encompassing financials, MD&A and an AIF should be optional, as for mining issuers, the filing of an AIF is a trigger for filing a technical report/s that is/are required to support new material disclosure of scientific and technical information about material mining properties. Technical reports require a significant expenditure of time and resources, and often mining issuers will time the filing of the AIF to ensure they have adequate time to prepare these reports. This may not line up with the filing of their financials and MD&A when earnings are announced. If the new unified report triggers a technical report filing requirement, mining issuers may not have the additional time to prepare the technical reports that they do under the current system, so it is important that they have the option of filing an AIF separately. Alternatively, the AIF trigger for filing a technical report under the unified report regime could have a delayed filing time similar to the regime that is now in place for news releases.

b. Simplifying the content of the Business Acquisition Report ("BAR") or revising the significance tests so that BAR requirements apply to fewer significant acquisitions

The IIAC is generally supportive of the amendments implemented by the CSA in its *Notice of Amendments to National Instrument 51-102 Continuous Disclosure Obligations and Changes to Certain Policies Related to the Business Acquisition Report Requirements* on August 20, 2020. These amendments, for non-venture issuers, deem the acquisition of a business or related businesses to be a significant acquisition for the purposes of requiring a BAR only if at least two of the existing asset, investment or income significance tests are satisfied, and increase the threshold of these significance tests from 20% to 30%.

The above changes will reduce the number of acquisitions – which are not, in substance, significant acquisitions in the context of the issuer's circumstances – that trigger the requirement to file a BAR. The increase in the threshold from 20% to 30% appropriately recognizes the relatively smaller size of Canadian issuers as compared to those in the U.S. market, and the relative costs and benefits of preparing a BAR for smaller transactions.

To more accurately reflect the fair value of an acquired business in relation to the issuer, we think the Canadian regime should adopt an element of the recent amendments proposed by the SEC in respect of U.S. requirements for acquired business financial disclosure.[1] For the purposes of the investment test, the Canadian regime should adopt a comparison to the issuer's market capitalization (which the SEC refers to as the aggregate worldwide market value of the issuer's voting and non-voting common equity) rather than its consolidated assets. In our view, the Canadian version of the investment test should be similarly revised to more accurately demonstrate the economic significance of the acquisition to the issuer.

However, we recommend that rather than ascertaining market capitalization of an issuer based on the last business day of the most recently completed fiscal year, the market capitalization should instead be determined as of a date that is in close proximity to the fair value measurement date of the acquired business (such as when the purchase price was agreed to). This would allow the issuer's fair value determination to be reflective of all current developments in the relevant business and industry and markets in general.

Consideration should also be given to using a volume-weighted average price over a number of trading days immediately preceding the applicable date, rather than just using a single day, or other mechanism to address the potential for an anomalous result due to light trading or volatility in an issuer's stock on a particular day or during a particular period.

Finally, the requirement that an acquisition financing include pro forma financial statements also lengthens the process and creates additional complexity. If it is impractical to prepare pro forma financial statements, issuers are forced to finance in the private placement market, which limits the number of the investors that can participate in a transaction. We are of the view that the inclusion of pro forma financial statements is not particularly helpful for investors and, in certain circumstances, can be misleading. We recommend that the requirement for pro forma financial statements in all circumstances be removed, and the regulation provide more flexibility in respect of the historical statements of the target company. Investors should be provided with information that is relevant to their investment decision, not information that is irrelevant or outdated.

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

Given the predominance of secondary market trading over primary distributions, the expansion of permissible activities from limited capital raising distributions to participation as selling group members in prospectus offerings and sponsors of reverse-takeover transactions represents a significant increase in the ability of EMDs to participate in capital markets activities, magnifying the investor protection and level playing field concerns.

Not only does the expansion of scope for EMDs pose an investor protection problem, it places the firms and individuals that have undertaken the steps required to meet the rigorous IIROC regulatory and educational standards at a disadvantage to the more lightly regulated and less qualified EMDs. These firms may be able to offer similar services without incurring the costs of creating and maintaining robust

[1] SEC Release Nos. 33-10635; 34-85765 - Amendments to Financial Disclosures about Acquired and Disposed Businesses

compliance and oversight systems and processes. The regular reviews of EMDs by their provincial regulatory bodies has consistently shown deficiencies in compliance processes, in particular, in the areas Know-Your Client (“KYC”) and Suitability. It is inconsistent with investor protection mandates to expand the ability of these entities to have exposure to retail clients prior to such problems being fixed.

Ultimately, the investing public bears the costs that result from inconsistent regulation. In addition to confusion about the regulatory and professional standards applicable to their advisors, fragmented oversight can lead to significant gaps in surveillance and enforcement of investor protection regulation. IIROC has a long history of actively regulating and providing oversight for the precise types of activities undertaken by the EMDs. Regulation has, and continues to evolve, based on the ongoing needs and experiences of investors, as well as the firms undertaking such activities. The skills, experience and resources required to develop, monitor and enforce regulatory requirements are significant. IIROC’s long history as the industry SRO has allowed it to develop the expertise and structure to provide such oversight.

12. Develop a Well-Known Seasoned Issuer Model

The IIAC supports the creation of a U.S. style Well-Known Seasoned Issuers (“WKSI”) program. This system, which permits issuers of a certain size, and meeting specific criteria to file an automatic shelf registration statement on Form S-3 would provide Canadian issuers with an efficient and effective means of capital raising, without compromising investor protection.

In terms of process, unlike for non-WKSI filers, the registration statement and any amendments are automatically effective without prior review by the SEC. This feature provides extraordinary flexibility to WKSIs filers because it eliminates any potential delay resulting from SEC staff review and/or comments. Another beneficial feature of a U.S. WKSI shelf is it allows WSKI filers to register an unspecified amount of securities on that shelf.

In order to be effective for Canadian issuers, the WKSI program thresholds should be adjusted to reflect that, relative to U.S. issuers, Canadian issuers have a smaller market capitalization and are more closely held. As such, we recommend that the US$750 million U.S. public float requirement be re-cast as a dual market capitalization and public float requirement. Without compensating for their more closely held nature, many Canadian issuers with a sufficiently wide market following may nonetheless remain ineligible to use the Canadian WKSI system for several years or indefinitely due only to their having one or more significant shareholders. In terms of the actual size, an appropriate threshold may be C$500 million market capitalization and C$200 million public float requirement for Canadian issuers.

The adjusted thresholds are sufficient to ensure that the issuer is of a significant size, such that it would have enough institutional following and analyst coverage to flag any disclosure issues, and ensure the issuer is in fact ’well known’. The issuer should be listed on a senior exchange for at least one year to fulfill the “seasoned” element of WKSI. Also, consistent with the U.S. WKSI model, we recommend there be an alternate eligibility threshold for issuers that are ‘well-known’ by virtue of their publicly traded debt.

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

There are a number of considerations that must be addressed when developing a regulatory response to concerns related to short selling in connection with a financing. One of the primary market integrity issues is whether the investor shorting the securities has undisclosed information about the upcoming financing. This is clearly a problematic situation, however, laws relating to insider trading would generally address this issue, and enforcement should be enhanced.

In the U.S., CFR 17 CFR § 242.105 - *Short selling in connection with a public offering*[2] prohibits an individual from buying into a public offering if they have sold the securities short within five days prior to the offering. Having a regulatory regime consistent with the U.S. would simplify cross border deals, create a level playing field for investors and may remove the current disincentive for issuers to undertake marketed deals for fear of having short sellers drive their share price down on a financing.

In developing a regulatory approach, two scenarios that must be addressed. When a marketed financing has been announced, and prior to pricing it, is appropriate to prohibit investors from selling short post-announcement and then buying into the financing to cover their short position through the financing. It would be permissible, however, to permit investors to cover their positions in the secondary market after the deal has been priced. For bought deal financings, where an offering is launched and priced at the same time, no such restriction would be necessary as all investors will find out about the financing at the same time, and there would be no ability to short sell securities in advance of launch and pricing.

If the financing has not been announced, and the investor did not have prior undisclosed material information regarding the issuer or the offering, the investor should be permitted to cover the short through stock purchased under the financing because in this scenario, such investor would not have any advanced knowledge of a financing and this does not disadvantage other investors because the trading activity conducted is in the normal course. This would not be permitted if the U.S. approach were taken and the securities were shorted within 5 days from the offering.

It may be prudent to depart from the U.S. approach, and prohibit market participants and investors who have sold short securities from the time of announcement to the time of pricing of an offering from acquiring securities of the same type under the prospectus or private placement. Once a deal is priced, investors would be free to short the securities. This does not put those without knowledge of a potential transaction acting within five days at a disadvantage.

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[2] § 242.105 Short selling in connection with a public offering.
(a) *Unlawful activity.* In connection with an offering of equity securities for cash pursuant to a registration statement or a notification on Form 1-A (§ 239.90 of this chapter) or Form 1-E (§ 239.200 of this chapter) filed under the Securities Act of 1933 ("offered securities"), it shall be unlawful for any person to sell short (as defined in § 242.200(a)) the security that is the subject of the offering and purchase the offered securities from an underwriter or broker or dealer participating in the offering if such short sale was effected during the period ("Rule 105 restricted period") that is the shorter of the period:
(1) Beginning five business days before the pricing of the offered securities and ending with such pricing; or
(2) Beginning with the initial filing of such registration statement or notification on Form 1-A or Form 1-E and ending with the pricing.

Further, it should be clear under any regulation that over-allotment /market stabilization activities carried out by investment dealers in their capacity as underwriters and agents must be exempted from any short-selling prohibition.

14. Introduce additional Accredited Investor (“AI”) categories

We support the expansion of the AI categories to allow for individuals who have demonstrated knowledge to qualify under this exemption. It is important, however, that expanded criteria is objective so it is simple to ascertain the investors’ compliance, and that it is the responsibility of the investor and/or issuer to sign off on such qualifications.

If technology could be leveraged such that investors could answer a set of questions, and provide relevant information which would ascertain their compliance with criteria set by regulators, and allow them to self-certify based on their answers, this would be very helpful in opening up the exemption to qualified investors, without imposing an undue burden and risk on dealers and issuers.

It would also be helpful to expand the accredited investor exemption to include educated, experienced investors, provided the standards are clear and easy to administer. In order to ascertain experience, it may be possible for the technology to require the investor to undertake some sort of test or go through questions that would help determine if they should be accredited. It is important that this process be administered independently, and that dealers would not be responsible for making this judgment.

The expansion of the accredited investor exemption is appropriate, and would not in any way diminish the dealers’ KYC or Suitability responsibilities, but would only allow such investors to participate in financings where they meet the criteria of the exemption and where the investment is suitable for the client.

15. Expediting the SEDAR+ project

We are fully supportive of the CSA’s expansion of the SEDAR+ project. The IIAC has made submissions and has met with the development team, and we are confident that they have identified the correct issues and are developing technology that will greatly improve the usability of the system, consistent with the input they have received.

Ensuring a Level Playing Field Promoting Competition

<u>Promoting Competition</u>

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

The IIAC has no comments on this proposal.

17. Increase access to the shelf system for independent products

The IIAC fully supports the amendments made to securities legislation to implement the Client Focused Reforms ("CFRs"), which make changes to the registrant conduct requirement to better align the interests of securities advisers, dealers and representatives with the interest of their clients, improve outcomes for clients, and make clearer to clients the nature of the terms of their relationship with registrants.

We have worked closely with the CSA and SROs over the years to provide input into the CFR rulemaking process, including ensuring that there is the right balance between achieving regulatory goals and the associated burdens on registrants. The suggestions put forward by the Taskforce would greatly increase the burden on firms without improving investor protection.

This is exemplified by the current know-your-product ("KYP") requirements that have removed previous overly prescriptive provisions, such as the requirement that a firm must perform a comparison between the securities it makes available to clients and other similar securities in the markets. Furthermore, the Companion Policy to NI 31-103 clearly states that it is up to firms to establish appropriate approval processes for securities they make available to clients and such appropriate processes for a firm may vary depending on the business model of the firm, the types of securities offered, the proficiency of its required individuals, and the nature of the relationships that the firm and its registered individuals have with clients.

In addition, the Companion Policy to NI 31-103 clearly indicates that it is an inherent conflict of interest for a registered firm to trade in, or recommend, proprietary products and this conflict almost always amounts to a material conflict of interest. Thus, in order for firms to address this conflict, they must be able to demonstrate that they are addressing this conflict in the best interest of their clients and the Companion Policy to NI 31-103 sets out numerous suggested controls that a firm should consider in order to address this conflict. One such controls is: "making non-proprietary products offered by the firm as easy to access for its registered individuals and its clients as proprietary products offered by the firm".

The IIAC believes that that the significant changes to be implemented through the CFRs will address any of the concerns articulated in the Consultation Report. Requiring additional regulatory reporting requirements, documenting detailed rationales and providing this document to the independent product manufacturers will not offer any measurable improvements to clients beyond what the CFRs will provide, and will significantly add to the regulatory burden, contrary to the objectives of the Taskforce.

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

We support the development of such a fund, ideally as a public/private investment fund with public funds invested alongside private contributions. This fund should be managed by professional fund managers rather than government employees, to ensure that the due diligence is objective and that there is no perception of political influence. This would provide retail investors with confidence and incentive to invest.

19. Improve corporate board diversity

The IIAC has no comments on this proposal.

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

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

IIAC member firms represent both retail and institutional shareholders. To enable shareholders to make informed decisions, the shareholder should have access to both the PAF's reports, and the issuer's response.

IIAC members firms believe that PAFs who provide consulting services to issuers and provide shareholder clients with voting recommendations should be required to disclose this potential conflict.

Ownership Transparency

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

The IIAC objects to this proposal. It should be noted that on March 13, 2013, the CSA published for comment proposed similar changes to the early warning system in Canada through proposed amendments and changes to MI 62-104, NI 62-103 and NP 62-203.

The CSA explained its rationale for rejecting the proposed changes, in a Notice dated February 25, 2016:

> *"We originally proposed to reduce the early warning reporting threshold from 10% to 5%. We considered this lower reporting threshold to be appropriate because information regarding the accumulation of significant blocks of securities can be relevant for a number of reasons in addition to signaling a potential take-over bid for the issuer.*
>
> *However, a majority of commenters raised various concerns about potential unintended consequences of reducing the early warning reporting threshold from 10% to 5% in light of the unique features of the Canadian public capital markets, including the large number of smaller issuers as well as limited liquidity. These commenters noted the potential risks of reducing access to capital for smaller issuers, hindering investors' ability to rapidly accumulate or reduce large ownership positions in the normal course of their investment activities, decreased market liquidity, and increased compliance costs. Taking into account these concerns, we have concluded that it is not appropriate at this time to proceed with this proposal. We are of the view that the intended benefits of the enhanced transparency are outweighed by the potential negative impacts of implementing the lower reporting threshold."*

We agree with this outcome. In our submission to the CSA, we raised various concerns about potential unintended consequences of reducing the early warning reporting threshold from 10% to 5% in light of the unique features of the Canadian public capital markets, including the large number of smaller issuers as well as limited liquidity for certain issuers.

Specifically, we are very concerned about the effect of reducing the threshold of Canadian issuers, most of which would be characterized as small-cap, when compared with their U.S. counterparts. The general impact of the proposal is much more significant for smaller-cap issuers, and will have many unintended negative consequences.

The primary impact of lowering the reporting thresholds from 10% to 5% will be a significant reduction in capital investment and access to capital for small-cap issuers. Currently, many institutional investors impose a hard cap on the percentage of securities in each small-cap issuer that they are willing to hold. This cap is often based on the trigger for early warning reporting requirements, which represent a material cost (particularly when compared to the size of the investment) and an operational burden for such investors. The requirements of the Early Warning Regime (including the level of detail required in the disclosure, the 2-day deadline on filing, the press release, and the 1-day moratorium on further acquisitions) means certain investors currently do not allow a level of investment that would trigger such requirements in the ordinary course.

The proposals will very likely result in more investors limiting themselves to lower ownership levels and will ultimately result in less access to capital for issuers, less investment in small-cap businesses in Canada, and less liquidity in the market.

Currently, small-cap issuers are generally less likely to have institutional investors (which are critical to their financial health) with ownership stakes exceeding 9.9%. As noted above, if the threshold is moved to 5%, it is extremely likely that many of these investors will reduce their investments to correspond with the reduced reporting requirements. This could have a devastating effect on small cap issuers who are already facing very difficult capital raising conditions.

Nevertheless, if the Ontario Government determines that the threshold should be reduced to 5%, it is imperative that the regime take into account the smaller cap nature of Canadian issuers, and that it be harmonized across Canada through a National Instrument.

The Canadian marketplace is different from the U.S. in respect to the size of the issuers, but also the concentration of owners and stock. Small-cap issuers tend to have fewer investors holding more securities, due to the smaller financing and public shareholder base. As such, the presence of institutional investors holding a material ownership stake is critical to such issuers.

If a lower reporting threshold were to be implemented, we recommend that issuers below a specified market capitalization be exempt from the lower early warning threshold and be subject to the current 10% standard to ensure that smaller cap issuers would not face a significant and negative effect on their ability to raise capital. We would suggest that a minimum level for such market capitalization threshold be $1 billion.

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

The IIAC has no comments on this proposal.

Shareholder Rights

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

The IIAC has no comments on this proposal.

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

The IIAC has no comments on this proposal.

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

The IIAC recognizes the growing importance of providing disclosure of ESG information to shareholders. We note that at this time, metrics related to ESG disclosure are not uniformly defined.

Some member firms have developed their own frameworks to address ESG commitments. The IIAC currently has working groups that are discussing standardizing a taxonomy for green bonds (where most financial institutions have frameworks that align to the International Capital Market Association's green bond principles) and transition bonds (where standards and taxonomy are not yet agreed upon).

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 IIAC supports the Taskforce's proposal to mandate universal proxy ballots as we believe it would enhance shareholder rights by simplifying the mechanics of proxy voting. We concur with the Taskforce that the current system for contested meetings can be overly complex when shareholders are forced to choose between the management and dissident nominees on separate proxy cards, and are unable to easily select a combination of the nominees. Shareholders should have the option to support a mix of management and dissident nominees without cumbersome administrative hurdles.

In order to ensure that universal proxy ballots are able to achieve the objective of reducing the complexity of voting, the IIAC recommends requiring plain language instructions on the ballot to ensure it can be completed correctly to give effect to the shareholder's intentions. For example, shareholders may be accustomed to selecting all nominees on a ballot, and for a universal proxy ballot, there may be more nominees on the ballot than can be elected. If a shareholder selects an incorrect number of nominees (i.e. selects 10 nominees when only eight vacancies exist), this invalidates the ballot. Further, there should be general guidance for proxy agents on how to address certain voting circumstances. A shareholder may only select six nominees when there are eight vacancies. There should be a standard as to how the proxy agent casts the remaining votes.

IIAC member firms acting as intermediaries do not anticipate any significant operational challenges in moving to a fully universal proxy ballot system.

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

The IIAC has no comments on this proposal.

Proxy Contests and M&A Transactions

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

The IIAC has no comments on this proposal.

Proxy Voting System

29. **Introduce rules to prevent over-voting**

The IIAC supports the Taskforce's proposal to codify the best practices found in CSA Staff Notice 54-305 *Meeting Vote Reconciliation Protocols* ("CSA Staff Notice 54-305") to reduce incidences of over-voting. IIAC member firms were actively involved in the development of the CSA's proxy protocols guidance. While CSA Staff Notice 54-305 is currently not mandatory, it is the IIAC's understanding that the protocols have generally been adopted industry-wide in an effort to improve shareholder voting accuracy.

The IIAC has concerns with the Taskforce's proposal to introduce the following rule: "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." This statement appears to put the sole responsibility on the intermediary. Intermediaries do not have a direct line of sight into what the tabulator has on record for entitlements. There should be a corresponding responsibility for the tabulator to provide the intermediary with the relevant information to ensure that the intermediary does not submit proxy votes for a beneficial owner client unless it has confirmed vote entitlement documentation.

It should also be noted that several IIAC member firms voluntarily participated in a study by the OSC on the impact of CSA Staff Notice 54-305 on over-voting. The data pointed to minimal incidences of over-voting related to Canadian intermediaries.

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 order to protect their client's privacy rights, the IIAC does not support the Taskforce's proposal to eliminate the NOBO and OBO status provided under NI 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* ("NI 54-101"). Intermediaries have received instructions from millions of clients at their account openings, and of those millions of clients, a significant number have made the decision to be objecting beneficial owners which prohibits their firm from disclosing beneficial owner information to the reporting issuer under NI 54-101.

NI 54-101 was designed to balance the rights and interests of reporting issuers, intermediaries, and shareholders. To mandate firms to provide reporting issuers with a client's private information, including their email address (even if they had expressly opted-out), would upend that balance and favour the interests of reporting issuers at the expense of shareholder's privacy rights.

The IIAC understands the securities law concerns for reporting issuers who may need a specific percentage of shareholders to vote in order to effect certain corporate actions such as a merger or acquisition transactions, and they are unable to directly contact all shareholders to encourage voting. Intermediaries can reach out to clients and provide the materials in an unbiased manner. We do not believe that overriding client instructions and their privacy concerns is warranted. Further, it would be challenging operationally to track any exceptions to the NOBO and OBO status for only certain corporate actions.

While we understand that other jurisdictions have implemented, or are in the process of implementing similar changes that require intermediaries to provide shareholder information to issuers, we note that the U.S. has currently retained the NOBO and OBO status.

If there were changes to NI 54-101 eliminating the NOBO and OBO status of clients, it would be a substantial undertaking for firms to contact all clients that had provided their instructions, with a new disclosure of the change in securities regulation, and also to obtain consent (if required under privacy law) to effect the change. From a client-service perspective, the intermediary has the relationship with the client to address returned mail or email failures.

The IIAC supports the Taskforce's proposal to facilitate electronic delivery of proxy-related materials, however, we do not believe it should be mandated. In general, member firms have been encouraging clients to move to electronic delivery for proxy-related materials. Member firms must obtain consent from the client for electronic delivery, and despite industry efforts, there are still numerous clients for which firms do not have any email addresses. In those instances, and for email failures, paper proxy-related materials are mailed.

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

Question: 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?

The IIAC believes sandboxes would help foster innovation in start-ups and entrepreneurs. Sandboxes allow firms to develop and test new and novel products and services alongside regulators.

The purpose of regulators related to a sandbox should be to:

1. Allow new businesses the ability to test their innovations while being "protected" by the regulator; and
2. Ensure a level playing field for all Canadian businesses.

A sandbox-driven process would be a safeguard against businesses going out to market without regulatory guidance for their new products and services. It would also be a safeguard against an unlevel playing field.

IIAC member firms have included additional feedback regarding sandboxes, the proposed Ontario Regulatory Sandbox, and the proposed Canadian Super Sandbox:

<u>Support for Regulatory Sandboxes</u>

The IIAC and its member firms are supportive of regulatory sandboxes that increase efficiency. However, we strongly believe in a level playing field for all market participants, and we note that FinTech companies should not benefit from unfair competition.

FinTech companies should not have the right to perform “regulated” activities without being properly registered: a registration exemption for these companies – when investment dealers must be registered – would give them an unfair advantage. To protect Canadian investors, we must ensure companies are not permitted to circumvent registration requirements and regulations.

IIAC member firms are supportive of regulatory sandboxes but would request clarity on the phrase “light regulatory touch”, which was used in the Consultation Report but not precisely defined.

<u>Ontario Regulatory Sandbox</u>

IIAC member firms note that dealing with their primary regulator through the OSC LaunchPad has been straightforward. Members agree that a merged OSC/FSRA Sandbox would make sense because the entrepreneurial models, which are subject to regulatory oversight, overlap between both organizations.

Members believe there should be harmonization between jurisdictions in order for regulatory sandboxes to provide true benefits to entrepreneurs, start-ups and ultimately to Canadian investors.

Canadian Super Sandbox

Theoretically, harmonization through a Pan-Canadian Super Sandbox would make sense, and ostensibly address the inefficiencies of dealing with different provincial and territorial sandboxes. IIAC member firms have been discouraged by such inefficiencies, including cases where an additional 12-month period has been needed to get approval from other jurisdictions, following approval by the OSC. We believe this situation is unfair to Canadian investors in some jurisdictions, and that innovative products and services should be made available to all Canadians – if beneficial to them – or to none, if not deemed beneficial.

A Canadian Super Sandbox, if implemented successfully, would allow for the development and roll-out of new products and services across all jurisdictions at once, rather than having firms work with and obtain approval from one regulator at a time. This process would be more efficient and would allow businesses to spend less time duplicating their efforts across jurisdictions. Such a streamlined approach should also allow innovations to reach the market faster.

However, industry members expressed significant concern about the likelihood this could be achieved. IIAC member firms have seen repeated disagreement on harmonization from the different jurisdictions across Canada, and therefore doubt that a Canadian Super Sandbox, even if truly beneficial for Canadian investors, could be easily and successfully implemented.

Question: If so, other than expedited blanket relief orders, what order services/regulatory relief can these sandboxes offer to help businesses raise capital and apply lighter touch regulation to allow these businesses to innovate?

As previously mentioned, we believe expedited blanket relief orders should not create an unlevel playing field.

We believe that sandboxes can provide additional services to foster innovation, such as:

- providing access to real, anonymous data;
- facilitating access to a network of qualified market participants and investors for feedback on innovative products and services;
- facilitating collaboration with different stakeholders – becoming a network connection point;
- ensuring confidentiality of innovative FinTech ideas;
- connecting FinTech companies and solutions that are potentially compatible;
- confirming that a solution meets certain guidelines for it to be useable or appropriate in terms of protecting investor privacy and basic security aspects;
- providing privacy protocols accepted in the industry;
- providing privacy/security governance;
- providing a privacy/security framework or checklist for innovation;
- providing privacy/security certification (this could be graded 1 to 5 for example, depending on the privacy/security needed).

Question: What are other ways that the OSC can help foster innovation?

IIAC member firms believe that sandboxes should move quickly to keep pace with innovation. Timelines should be shortened, and regulatory approval should be swift, to spur innovation in the industry.

We believe that regulators should grant additional support to entrepreneurs who do not have experience in the financial industry. Since the industry is highly regulated, creative and innovative entrepreneurs from outside the industry may deem it too complex to navigate. However, with the help of a regulatory contact with whom they could discuss topics such as privacy, investor protection and industry guidelines, entrepreneurs could contribute greatly to a more vibrant and innovative industry.

Perhaps the clearest way the OSC can help foster innovation in the industry is to turn its focus towards hiring tech-savvy, forward-thinking employees who wish to promote innovation as they consider the matching of new products and services to existing rules and regulations.

The IIAC and its member firms also believe that regulators should be involved with universities to demonstrate their support for innovation at the educational level, and to foster this spirit in the next generation. We believe these actions would prove the regulators' desire to foster innovation and would demonstrate the importance of innovation for the community.

Question: 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?

As previously stated, the Sandbox should include tech-minded people, preferably with regulatory knowledge.

32. Requirement for market participants to provide open data

Question: 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.

The IIAC and its member firms support the concept of open data, as it allows Canadians to own and control their personal information and financial data.

<u>Benefit to Investors & Concerns and Challenges:</u>

We believe that Canadian investors should be able to move their financial products and transfer their personal information based on their own needs. Investors should be able to see their data in an aggregate form, whether or not they choose to use different financial institutions.

The COVID-19 crisis has made it clear that digital adoption and smarter services are essential to Canadian investors. Open data, which provides access to more data, and therefore to a more integrated digital ecosystem, needs to be included in this transformation.

We note that Canadians are already sharing their personal data with unregulated organizations, in an unregulated manner. For example, investors do so when they share their login credentials and passwords with technology firms such as data aggregators. Since "open data" is already a reality in the country as clients release their personal information to different organizations, we believe Canada must act quickly to build strong regulation around the transferring and sharing of data. Robust cybersecurity safeguards and privacy frameworks need to be developed and implemented across the country, and Canada should look to countries that have already implemented open banking, for guidance.

It is critical to establish what type of data is eligible to be considered "open data". The approach taken under the General Data Protection Regulation ("GDPR") applies to the personal data the individual has provided to the firm, and excludes data developed on an individual by a firm's own analytic systems. Our members would recommend this approach.

Furthermore, data portability needs to be restricted to certain basic data fields, as some firms may have more data than others. As noted above, data that is developed through a firm's analytic tools should not be portable.

We also believe that open data must be accessed through readily available technology: firms should not have to invest in developing technology for this use. Rather, an approach consistent with the GDPR should be taken, where "the data subject's right to transmit or receive personal data concerning him or her should not create an obligation for the controllers to adopt or maintain processing systems which are technically compatible" (Section 68).

The IIAC Privacy Committee has previously commented that investor protection and data privacy must be a priority for regulators. If there are issues during a data transfer that, for example, lead or result in a cybersecurity breach, it must be clear where the potential liability rests. There must also be appropriate limits to liability, where the senders and receivers of such data have appropriate safeguards in place.

Question: Do you see a role for the province in setting data protection and privacy standards?

The IIAC and its members firmly believe that data protection and privacy standards must be harmonized throughout the different jurisdictions in Canada. Consistency is the key to easing the regulatory burden and ensuring investors are well protected.

We believe that provincial jurisdictions should defer to the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA") standards. This would create a consistent national framework that all entities would follow. Without such a framework, an overly complex system results, where there may be separate investor protection and privacy standards for each of the provinces and territories, leading to a difficult and burdensome system, with no added value to investors.

Provincial jurisdictions have issued privacy proposals that are not practical or consistent with PIPEDA. Some of the issues identified by IIAC members include:

1. Penalties that are excessive and not scaled to the offence;
2. Breach reporting requirements that are different to other laws, adding to the regulatory burden;

3. Mandatory privacy impact assessments without thresholds, which are inconsistent with the GDPR;
4. Separate consent for each use and each processor, which cannot be operationalized in an industry as complex as the financial industry;
5. Restrictions and consent on out-of-province processing which could prohibit cloud processing and other out-of-province processing;
6. Obligation to inform individuals of technology that allows them to be identified, located or profiled – the specific nature of disclosure and consent means essentially all analytics would have to be described in detail, which is impossible to operationalize;
7. Data portability – unclear scope;
8. Right to be forgotten – firms may not be able to purge all complex systems of all data about a person, especially when used in analytics and in combination with other data;
9. Right to object to automated processing – not possible to provide service if processing is not automated. Providing all the details about each processing application would lead to "books" of disclosure.

Since data is nowhere and everywhere at once, such as when stored in the cloud, we believe that protection and frameworks surrounding data must be harmonized in Canada, and perhaps globally.

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

Allowing for greater access to capital for start-ups and entrepreneurs would help innovation. However, IIAC member firms are already involved in raising capital and would want to play a role in assisting start-ups and entrepreneurs.

Question: Should current registration requirements be changed to enable angel groups to work with their "accredited investors" 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.

IIAC member firms request clarity about how angel investors would participate without being registered in some manner. Would angel investor groups be exempted from registration? Would a new registration category be created for them? The OSC must ensure investors are well protected and that no regulatory arbitrage is possible (where some need registration to raise capital while others do not).

Question: Should this apply to only not-for-profit angel groups?

We believe it should apply to both not-for-profit and for-profit angel groups.

Question: Should changes in registration requirements be by way of regulatory relief (exemption), exemptive relief or through a form of no-action letter when meeting specific requirements?

The IIAC has no comments on this proposal.

Question: How can P2P lending frameworks be leveraged to support capital raising of such early-stage start-up businesses?

The idea of leveraging P2P lending frameworks is interesting, however, greater regulatory changes would be needed to properly develop it in Canada.

IIAC members believe that in order to increase capital-raising, rules that restrict independent dealers distributing proprietary funds of private equity and small business listed shares should be modified. Relief would facilitate capital raising.

We believe more clarity around this item is needed before IIAC member firms can properly comment.

Modernizing Enforcement and Enhancing Investor Protection

<u>Modernizing Enforcement</u>

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 IIAC supports streamlining some inter-provincial reciprocation under the *Securities Act,* but does not support automatic reciprocation, and does not support streamlining reciprocation of SRO orders, orders made by courts, or orders made outside Canada.

In the IIAC's view, reciprocation provisions should not apply to Canadian or foreign SROs or exchanges for the following reasons:

- IIROC orders already apply across the country, as do MFDA orders (except in Quebec).
- Allowing for OSC reciprocation of domestic SRO/exchange orders is inconsistent with the *Securities Act* scheme, which provides for delegation of oversight to the SROs/exchanges (within their jurisdiction).
- Issuing SRO orders as OSC orders will potentially have unintended negative consequences for investment dealer business activities and operations, domestic and foreign (e.g., ability to participate in certain transactions, bid on certain work, fulfill other contractual obligations, and/or operate in certain jurisdictions).

In the IIAC's view, court orders and orders of foreign securities regulators (outside of Canadian provinces) should be excluded from automatic or streamlined reciprocation. An automatic or streamlined reciprocation power provides courts and foreign regulators with an improper influence over Ontario securities enforcement that they would not otherwise have. The current process for reciprocation of court and foreign orders under s. 127(10) of the *Securities Act*, including a requirement that there be a finding that adopting the order is in the public interest, should continue to apply.

To the extent that streamlined reciprocation provisions are adopted in respect of extra-provincial regulators, it is imperative there be a pre-emptive opportunity to be heard before the Commission (i.e., that automatic reciprocation not be adopted). Market participants at a minimum must have the ability to challenge the scope of the reciprocal jurisdiction and whether the content of the reciprocal order is identical to the underlying order. The hearing right should also be used to address the issue of the degree of fairness provided in a foreign jurisdiction. The Commission should use the same standards courts use to decide whether to enforce a foreign judgment.

The IIAC agrees with the Taskforce that no reciprocated orders or settlements should have automatic effect in Ontario unless the OSC has the power to make a similar order or settlement, and that monetary sanctions or voluntary payments agreed to in a settlement should not be reciprocated. Otherwise, the OSC's jurisdiction will be indirectly expanded on an unlimited basis to include the jurisdiction of each and every foreign regulator, and jurisdiction may not accord with our approach and values.

35. Improve the OSC's collection of monetary sanctions

The non-payment of monetary sanctions detracts from the effect these sanctions were designed to have on conduct in our capital markets. We are supportive, therefore, of additional tools for the OSC to improve collection of monetary sanctions.

We suspect the OSC's collection difficulties stem from the fact that respondents often have limited assets or poor credit and, therefore, not capable of paying the sanction. While the OSC has the discretion to consider a respondent's ability to pay when imposing financial sanctions, we understand the OSC's practice is to impose the monetary sanctions that are appropriate for the infraction, irrespective of the respondent's ability to pay so as to deter others from contravening the *Securities Act*. We are concerned that the OSC's inability to collect unfortunately also sends a message to potential wrongdoers.

The OSC currently publicizes information on respondents who are delinquent in paying monetary sanctions and disgorgement orders via a list buried on the OSC website. This naming tactic can be made more effective if the list were perhaps given more prominence on the OSC website and shared with other outlets in the province.

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

Misleading and untrue statements about publicly-listed companies contribute to investor risk and detract from market integrity. The danger of such statements and "Short and distort" campaigns have also discouraged companies from going public, thus impairing capital formation. It is understandable, therefore, why the Taskforce proposes a new and specific prohibition on making false or misleading statements about public companies.

Research analysts at IIAC member firms are already held to a high standard through IIROC rules (e.g. IIROC Rule 3400). In the IIAC's experience, perpetrators are often not registered in any capacity with a regulator and commonly utilize social media to communicate inaccurate information and influence investor decisions.

It is increasingly difficult, therefore, to effectively trace or monitor much of the commentary that the Taskforce is targeting. In such cases, any specific prohibition contemplated by the Taskforce would be difficult to administer and enforce.

Outside of social media, there are individuals in the business of providing some form of analysis and recommendation of securities, for example, in the form of newsletters. These authors are often not employed at a regulated entity or otherwise registered in any capacity. Ideally, investors would benefit if certain basic fundamental disclosures were included in the reports provided by these authors including:

1. Disclosure of whether the author, directly or indirectly, holds a short or long position in the security.
2. Disclosure of whether the author is compensated, directly or indirectly, by other parties, other than by subscribers or advertisers, for this research.
3. Disclosure of any conflicts of interest.
4. Disclaimer that the information provided is true, to the best of the author's knowledge.
5. Contact information of the author(s).

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

The IIAC has no comment on the maximum dollar amount. In the IIAC's view, the quantum in any particular case should remain at the discretion of the adjudicative panel, governed in accordance with normal sentencing principles.

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

We do not support broadening administrative summons powers and/or creating administrative production powers to include "find and gather" and "prepare and produce …in the form and within the timeframe requested by the investigator". An unlimited and unchecked power to compel market participants to create new documents and compilations and to produce documents, records and electronic data in a particular form and to impose a unilateral deadline would be unduly onerous. It would amount to a mandatory injunction without any of the associated procedural safeguards and does not accord with the government's objective of burden reduction for market participants. Furthermore, mandatory injunctions are disfavoured by courts and should not be imposed without court involvement. The existing Part VI investigation powers (search, summons) are broad and are sufficient to achieve protection of the public interest.

To the extent the Commission sees the addition of production orders as necessary to assist with criminal and quasi-criminal investigations, it should be made clear in any legislative amendments that:

- The orders must not be obtained in the context of administrative proceedings (i.e. Part VI investigations and/or where section 127 proceedings are contemplated).
- The orders must not require recipients of a production order to create a document or provide analysis that does not otherwise or previously exist.

- The orders are subject to the proportionality requirement in the Taskforce proposal #42.
- The orders are to be obtained from a judge and the subject has a right to apply for the order to be revoked or varied prior to compliance (cf. sections 43-45 of the draft *Capital Markets Stability Act*), on the basis that:
    - it is unreasonable in the circumstances to require the applicant to prepare or produce the document; or
    - production of the document would disclose information that is privileged or otherwise protected from disclosure by law.

Finally, if new "find and gather" and "prepare and produce" powers were to apply to administrative investigations (which the IIAC does not support), it is imperative that such powers be limited by adopting the "advice and directions" and "reasonable and proportionate" in Taskforce proposals #39 and #42.

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

We support the addition of a new "advice and directions" power. In the IIAC's view, this is the most significant of the Taskforce's investigation-related proposals (namely, proposals #34 to #46). It is a vital and appropriate response to the lack of a clear process for adjudication of issues which arise in the course of Part VI investigations and examinations, and which lead to impasses and delays. The ability to seek advice and directions will assist in streamlining the investigation and examination process by providing a process for the efficient resolution of issues by a neutral adjudicator.

The recent decision of the Commission in *B (Re),* 2020 ONSEC 21 is illustrative of the issues that this proposal is intended to address. In *B (Re),* the Commission pointed out that having such a power for advice and directions during the investigation stage would be more efficient to resolve disputes that arise pursuant to a section 13 summons, for example, and queried whether contempt proceedings are more forceful than is warranted in some circumstances – an issue that is also relevant to the Taskforce proposal #40.[3]

"Advice and directions" applications could be made available to section 11 investigators and section 12 examiners, in addition to any person or company directly affected by an OSC investigation or examination, if this would be of assistance. It is the position of the IIAC that the applications should be heard in the absence of the public, unless the Commission orders otherwise.

The new "advice and directions" drafting should mirror the language in subsection 126(7) of the *Securities Act* and include the power to vary or revoke an investigation or examination order. In the IIAC's view, there is no principled reason for the new Part VI power to be different from the existing Part XXII "advice and directions" power (which is in the context of freezing orders).

Further, it is imperative that the "advice and directions" power apply to summonses as well as to investigation and examination orders. In the experience of IIAC members, a new mechanism is required for resolving issues with respect to summonses.

[3] *B (Re),* 2020 ONSEC 21 [*B (Re)*] at paras. 19-21.

It is also imperative that the new "advice and directions" power be provided for in the *Securities Act*, particularly given that a similar power already exists in subsection 126(7). It does not appear to the IIAC that such jurisdiction may be conferred on the Commission by way of the OSC's *Rules of Procedure* under the *Statutory Powers Procedure Act*. The Commission does not currently have a statutory power of decision in respect of clarification, variation or revocation of investigation orders.

Finally, the IIAC supports the proposals that documents be provided to persons served with a summons in order to facilitate oral examinations, and that there be an opportunity to comply by initially producing a subset of responsive documents and also to meet and confer with OSC Staff. These changes are likely to reduce the incidence of delays and issues between the parties, and to assist market participants in complying with their obligations.

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

The IIAC supports the inclusion of a leave requirement for contempt proceedings. It is critical that there be oversight by the Commission before public contempt proceedings are initiated to ensure a phased approach for market participants attempting in good faith to engage in the investigation process. As noted, the Commission recently queried in *B (Re)* whether contempt proceedings are "more forceful than is warranted" in certain circumstances.[4]

The IIAC's position is that leave hearings be heard in the absence of the public, unless the Commission orders otherwise.

Given that Part VI already contains a contempt remedy for non-compliance, it would be duplicative to include new offence(s) in respect of non-compliance with Part VI investigations. In any event, the existing contempt remedy is arguably a more serious consequence than what might eventually result from an offence proceeding, given that it is available from the Superior Court rather than the Commission and, therefore, better addresses deterrence and any other concerns that OSC Staff may have with respect to non-compliance under Part VI. The Superior Court has the strongest inherent enforcement jurisdiction in the circumstances.

If a new offence is warranted in other contexts, such as criminal and quasi-criminal investigations (e.g., for breach of production orders) or in proceedings before the Commission, it is the position of the IIAC that the new offence provision(s) must:

- Clearly delineate that it should only apply where a person attempts to "destroy, conceal or withhold" evidence reasonably required for a hearing, etc. (akin to the provision in the Alberta *Securities Act*), ensure that there is no overlap with the contempt provisions in Part VI, and provide expressly that the offence may not be pursued in the context of Part VI investigations.
- Contain a similar leave requirement as is proposed in respect of contempt proceedings. Staff are presently not required to seek leave/approval of the Attorney General or the Commission before

[4] *Ibid.*

initiating quasi-criminal proceedings in respect of *Securities Act* offences. If a leave requirement for new offences is not included, the same risk of inappropriate use of contempt proceedings will arise in the context of obstruction/non-compliance proceedings.

In our view, it would be difficult to benchmark or prescribe parameters with respect to a reasonable time for compliance with a summons. It is imperative that the Taskforce proposals #39 to #43 be adopted (with the changes outlined in this submission) in order to address issues relating to the scope of summonses and the ability of market participants to respond to them in a timely manner (i.e., new "advice and directions" power, leave requirement for contempt proceedings, broaden confidentiality exceptions, ensure proportionality, clarification regarding privileged documents).

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

We recommend that each of the new categories of proposed confidentiality exceptions be added to the *Securities Act*. Market participants are unable to share information as required by law and/or good corporate governance, and in order to respond to investigation requests and summonses, due to the constraints of the existing confidentiality requirements in section 16 of the *Securities Act*. While OSC Staff do work with market participants to provide their informal consent to disclosure from time to time in particular circumstances, Staff consent does not provide market participants with the legal authority for these disclosures pursuant to the current legislation.

The IIAC's comments in respect of the proposed new confidentiality disclosure exceptions are as follows:

a) To "a prudential financial regulatory authority", in a new section 16(1.01)

   This addition is required in order to clarify that disclosure of investigation orders to Office of the Superintendent of Financial Institutions and equivalent regulators (in Canada or elsewhere) is permitted. The exception should be as of right and without any notice requirement, similar to the existing exception in subsection 16(1.1)(a).

b) To an expanded list of counsel, in subsection 16(1.1)(a) (e.g. the person's counsel, the company's counsel, or counsel for the person's employer)

   This addition is required in order to expand/clarify the instances in which lawyers may be notified of the matters set out in subsection 16(1), in order to facilitate responses to investigation requests and summonses. The exception should remain as of right and without any notice requirement.

c) To "any other person where the disclosure is necessary to comply with Part VI", or for "sound corporate governance"

   This addition is required in order to facilitate disclosure (e.g. to internal compliance and governance officers) and/or to the extent that disclosure is otherwise required to comply with investigation requests/orders. The IIAC proposes that the process (including timing and drafting) mirror the new (in 2019) subsection 16(1.1)(b), which permits disclosure to insurers subject to notice being given to the investigator at least 10 days prior to the intended disclosure, which permits OSC Staff to object in appropriate circumstances.[5] The IIAC proposes that an associated amendment in section 163 of the General Regulation be made in order to stop the clock on the return of a summons during the notice period in the new proposed section 16.

d) To the company's board of directors and senior management

The IIAC supports this confidentiality exception (but note that it may not be necessary if the addition proposed in c) above is adopted in its entirety). The comments in respect of the addition proposed in c) above would apply here as well.

We note that additional confidentiality exceptions should be included in order to allow for disclosure of otherwise confidential information in the new "advice and directions" and "contempt leave" hearings proposed by the Taskforce.

42. Ensure proportionality for responses to OSC investigations

The IIAC supports the inclusion of a proportionality threshold and, as such, it is imperative that some limits be proposed to the response to investigations/examinations in order to achieve the goal of burden reduction – particularly in the electronic data-intensive world in which they now all operate. In the absence of any reasonable threshold, requests for data, and the deadlines imposed, have the potential to be overly onerous and disproportionate to the countervailing public interest objective in each particular instance.

We are of the view that reference should be made to more modern schemes which include a reasonableness threshold (e.g. the *Regulated Health Professions Act*) and the proportionality factors which apply to production of documents in civil litigation (added in 2010 to the *Rules of Civil Procedure*). For example:

> Any examination or inspection of documents or other things shall be reasonable and proportionate to the investigation, taking into consideration factors such as the time and expense required, undue prejudice, the volume of documents, and whether the information or document is available from another source.

It is imperative that proportionality be included in the *Securities Act* rather than introduced by way of "other mechanisms". Given the existing broad scope of the investigation and examination powers in subsections 11(3) and 12(3) of the *Securities Act*, which are not subject to the discretion of the Commission, the IIAC's position is that any proportionality threshold will need to be introduced by way of amendment to the legislation in order for it to be legally effective. Furthermore, if the policy direction is not provided in the statute, there is the potential for less certainty on the scope of required responses to investigations/examinations.

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[5] We note that this approach is consistent with the existing approach taken in the *Securities Act*, which provides for a blanket statutory confidentiality with appropriate exceptions and safeguards. This is in contrast to the approach taken in, for example, British Columbia, where a confidentiality order in respect of the existence of the investigation, inquiries made by the investigators, and/or names or witnesses must be sought by staff in every case.

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

The IIAC supports the Taskforce's proposal to add language in the *Securities Act* to specify that privileged documents must not be required to be produced during OSC investigations or examinations. We recommend that the language further specify that privileged documentation includes written, oral, or electronic forms, as well as any other tangible or intangible form.

To recognize the OSC's competing interest to know what information is being withheld and why, the Taskforce proposes the production of a privilege log. We have concerns with this proposal. Namely, the creation of such a log can be a time-consuming and sometimes difficult task, requiring significant resources and attention. Furthermore, there may be a fine balance between providing sufficient details to demonstrate the basis of the claim of privilege to appease OSC examiners without disclosing the substance of the privilege.

As such, we do not believe OSC examiners should require a privilege log as normal course. Our preferred alternative is that a privilege log be required if the Commission makes an order to that effect under the advice and directions power and that such request also be subject to proportionality requirements.

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

We support the Taskforce's proposal inviting respondents to discuss alleged infractions and potential resolutions with OSC staff at least *three* weeks before initial proceedings, but submit that the timeframe must be expressly extended in complex matters.

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

We support this proposal.

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

It is appropriate to allocate these funds to investors who have been proven to have been harmed through improper registrant behaviour. This could simplify the procedure, reducing administrative costs and allowing for more timely distribution of funds to victims. It is important to ensure that funds distributed through this process be taken into account where an investor obtains compensation via the Ombudsman for Banking Services and Investment ("OBSI") process and vice-versa. Although investors should be appropriately compensated where they are harmed as a result of inappropriate advisor activity, they should not be unjustly enriched through double compensation via two separate programs.

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

We believe the current operation of OBSI, which provides investor access to a simple, low cost, and timely independent dispute resolution body serves clients and the industry well in the vast majority of cases. This is evidenced by the fact that, according to the OBSI Annual Report, no firm has refused to provide compensation to investors pursuant to the OBSI process since 2016.

Introducing binding decision-making authority to this process will change OBSI's operations significantly, and will introduce additional resourcing requirements, costs, delays and complexities that will undermine OBSI's mandate to provide this low cost, efficient dispute resolution mechanism that is simple for consumers to navigate.

As noted in the proposals, in order to ensure the binding authority is balanced with procedural fairness, OBSI would need to create an independent appeal process which is necessary not just for participants in OBSI's process but also to ensure that OBSI's decisions are able to withstand scrutiny on appeal or judicial review. This would necessarily add time and uncertainty to the process.

In order to facilitate, and in addition to the appeal process, due process would also require the amendment of OBSI's Terms of Reference to include policies and procedures dealing with evidence, witness statements, documentation and the ability to provide responses to allegations. The requirement for full written reasons for decisions would also increase the time and cost of resolution. The development of this regulatory infrastructure requires resources to maintain and monitor its operation. This would necessarily require additional ombudsman staff with appropriate expertise, making the provision of the service more expensive.

The additional due process provisions would also have an impact on investors seeking to access the service. Currently the process is accessible in its informality, without rigid procedural requirements. The introduction of binding authority will mean that firms, now bound to a compensation requirement, would require clear due process steps be built in the procedures which would replace the current, more informal discussions and negotiations that characterize the process, and in most cases, ensure both the firm and the client are satisfied with the outcomes. The addition of the procedural safeguards would necessarily lengthen the time required to investigate and make recommendations, and will introduce a more formal complexity, possibly including the need for counsel, that may discourage clients, particularly unsophisticated ones from entering into the process.

Given that, according to the 2019 OBSI Annual Report, the average compensation for OBSI cases in 2019 was $14,291, the introduction of a complicating bureaucracy is unlikely to be justified from a consumer or industry perspective.

We acknowledge OBSI's assertion that they have encountered situations where certain firms have responded to recommendations in favour of a client with an offer well below what OBSI has recommended as fair compensation. This behaviour clearly is contrary to the objective of participating in the ombudservice, and diminishes the confidence in this important service.

We do not, however, believe that in order to address this issue, the fundamental structure of OBSI requires an overhaul to make its recommendations binding. As noted in the OBSI Annual Report for 2019, Jim Emmerton, the Chair of OBSI notes that this strategy of undercompensating complainants represents a fairly small number of overall cases.

This issue was noted by the regulators with jurisdiction over OBSI and its participants in December 2017, in the Joint CSA Staff Notice 31-351, IIROC Notice 17-0229, MFDA Bulletin #0736-M, *Complying with requirements regarding the Ombudsman for Banking Services and Investments* (the "OBSI Notice").

In the OBSI Notice, the regulators indicated that the behaviour of " repeatedly settling for lower amounts than recommended by OBSI can sometimes be a risk-based indication of problems with a firm's complaint handling practices", and that as part IIROC's risk-based reviews, they "will particularly take note of patterns involving these activities."

The OBSI Notice also indicated that regulatory staff "will take note when a registered firm is involved in a refusal case or a pattern of repeatedly settling for amounts lower than OBSI recommendations."

As it appears from the above, the regulators have the appropriate authority in such instances to conduct a formal compliance review and, where a pattern has been established, can subject the firm to regulatory penalties, including:

- recommending terms and conditions on the registration of the firm or registered individuals to mitigate risks in the area of concern; and
- initiating an enforcement investigation of the registered firm and/or registered individual relating to the issue.

Since the publication of the OBSI Notice in December 2017, it is not clear whether the regulators have been monitoring this area of concern, and if so, if they found and sanctioned firms for such activity. Prior to creating a significant new bureaucracy, which would materially affect the access to, and functioning of the current system, regulators should ascertain the scope of the issue and how they can more directly target the perpetrators, rather than imposing a costly solution on the entire industry.

In respect of the proposal to increase the compensation threshold to $500,000, we note that according to the 2019 OBSI Annual Report, the average, median and maximum recommendation for 2019 were $14,291, $2,114 and $280,000 respectively. Increasing the limits does not appear necessary.

We also note that IIROC has an arbitration system that is unutilized. This system, which has a compensation limit of $500,000, takes into account its binding decision-making power and has built in due process mechanisms. Given that this existing system has not been embraced by investors or firms, it is unlikely that modeling the OBSI system to look more like this arbitration system would increase its functionality or attractiveness to investors.

The OBSI system, with a few specific exceptions, is effectively functioning as a low cost, accessible consumer redress mechanism in the majority of cases. The issue of under-compensation by certain firms has been clearly identified and can be addressed under existing regulation, by the relevant regulators. We believe this targeted approach can effectively manage this limited problem without potentially complicating a system that has proven to be beneficial to both clients and industry.

Thank you for considering our submission. The IIAC would be pleased to respond to any questions that you may have in respect of our comments.

Yours sincerely,