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Submission of TD Bank Group to the Ontario Securities Commission regarding OSC Staff Notice 33-753 – OSC Consultation on Tied Selling and other Anti-Competitive Practices in the Capital Markets (the "OSC Staff Notice")

TD welcomes the opportunity to provide responses to consultation questions contained in the OSC Staff Notice. Our responses reflect TD's specific insights and highlight our experiences. We share the goal of the Ontario Government and the OSC in analyzing whether abusive or coercive behaviour is taking place.

The comments and recommendations in this letter are informed by the following:

- TD's business, experience, and track record as a Canadian (and increasingly international) leader in financial services and capital markets activity.
- The unique characteristics of Ontario's capital markets, which include both domestic firms (bank-owned and independent dealers) as well as foreign dealers and global multinationals – a model that heightens domestic competition while offering Canadian issuers access to dealers with global perspective and reach.
- Recognition that coordination and harmonization amongst regulators and legislatures is essential to enhance our national competitiveness – Ontario-only solutions and changes may increase complexity and harm Canada's competitiveness.
- The need for appropriate regulation to prohibit harmful behaviour.
- That both regulators and financial institutions keep the success and competitiveness of Ontario businesses at the centre of all our efforts, providing them with a vibrant and effective means to transact, invest, raise capital efficiently, and grow.

Pursuant to the letter sent November 19, 2021 from the Ontario Minister of Finance to the Ontario Securities Commission, the Minister requested that the OSC undertake an analysis of the practice of tied selling. We note that the Minister's request was in respect of tied selling, however the consultation questions contained in OSC Staff Notice 33-753 and the recommendations set out in the Capital Markets Modernization Taskforce Consultation Report, July 2020, go beyond rules which make it illegal for a financial services provider to engage in tied selling. Rather, the consultation questions contained in OSC Staff Notice suggest a need for, and the Taskforce recommends, rules to prohibit issuers from engaging financial services providers in certain circumstances where there is no harm to the issuer, and which will have significant negative unintended consequences for issuers and investors.

The consultation questions contained in the OSC Staff Notice are set out in bold below, along with our responses.

1. **Is there evidence of commercial lenders requesting issuer clients to retain the services of a dealer or adviser affiliated with the commercial lender to assist with the issuer's capital raising and/or advisory needs, or vice versa? If yes, please provide particulars.**

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Yes, such requests may be made in the context of ordinary course procurement of financial products and services by an issuer client. At the outset, it is important to distinguish between coercive tied selling, pursuant to which the provision of one service is made conditional by a financial institution on obtaining another service (the "**Prohibited Activity**"), versus the right of issuer clients to select the service provider of their choice and the method, timing and criteria for selecting a service provider and the ability of financial services providers to provide services on a Bundled basis and/or offer Preferential Pricing, each as defined below, either because such services are offered by a financial services provider or at the request of, or as expected by, an issuer (the "**Defined Activity**"). It is important to understand that the issuer client decides who to approach when hiring financial service providers and may award business to separate service providers (M&A mandates, equity capital market ("**ECM**") and debt capital market ("**DCM**") mandates and lending arrangements) and may choose to purchase these services together from one or more financial service providers. TD may offer, and clients may request, that TD provide, (i) more than one product or service together on a "bundled" basis, and (ii) preferential or relationship pricing, in each case based on a number of factors and considerations as described in this letter, and to the benefit not the harm of the issuer ("**Bundling**" or "**Bundled**", and "**Preferential Pricing**", respectively). Any decision whether or not to engage products separately or on a Bundled basis, or to offer or request Preferential Pricing either on an individual product or as a result of the Bundling of products, is based on the issuer's expectations and choice, the circumstances, the capabilities, experience and competitive position of the financial service provider, the quality of the client coverage by the financial service provider, and the volume of products and services being offered or requested. The Defined Activity, including a request that an issuer client retains the services of a dealer or adviser affiliated with the commercial lender to assist with the issuer's capital raising and/or advisory needs may occur in this context, but does not constitute the Prohibited Activity.

The Prohibited Activity is a harmful practice that involves abusive behaviour or coercion. It impedes competition and harms issuers and is therefore already illegal in Canada. The ability of issuers to freely choose their financial service providers encourages competition, benefits clients with improved transaction execution, increased confidentiality and provides them with favourable economic outcomes. TD does not participate in the illegal practice of the Prohibited Activity.

TD competes for client business with bank-owned Canadian dealers, Canadian or global independent dealers, boutique advisory firms, global universal banks, foreign bank lenders and non-bank lenders (e.g. private capital or alternative lenders), in a competitive market, with each financial service provider having a variety of different expertise, capabilities, capital, and other factors which may be necessary to meet the needs of an issuer in any particular circumstances. In many instances, an issuer client's decision to obtain a particular financial service occurs at a different point in time from a decision to obtain another financial service. However, we respond to client expectations and requests and offer financial services on both a separate and on a bundled basis, often at the direct request of our clients. A client may also choose to seek competing proposals from multiple lenders and dealers, and as a result, have the opportunity to select one or more lenders or dealers based on competitive pricing or they may select to work with a small number of financial institutions based on criteria such as confidentiality (i.e. M&A transactions), seamlessness of execution, or time to market considerations.

It is critical to examine any need for regulating the Defined Activity, including the ability of lenders to offer issuer clients the option to retain the services of an affiliated dealer/advisor, and the basis upon which such activity is distinguishable from businesses that offer diversified services and bundle or offer preferential rates across such services without the need for regulation. This general practice of Bundling or Preferential Pricing by businesses with diversified offerings provides competitive benefits to the client. Responsibility for good decision making in the procurement of financial services lies with management of the issuer and the issuer's board of directors which is accountable to shareholders. We do not see a policy rationale for regulating this fundamental and pre-existing exercise of good governance; however, we do see unintended consequences resulting from attempts to do so, including limiting an issuer's choice and disadvantaging one group of service providers for the financial benefit of another.

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Set out below is further detail on the Prohibited Activity, the Defined Activity, market dynamics and processes, and unintended consequences of incremental regulation.

Coercive Practices vs Healthy Competition

The tied selling provisions under the Bank Act, securities law and the Competition Act seek to protect market participants from coercive or abusive selling when a client is forced to accept a service in order to receive another service. The implication of the Prohibited Activity is that the client may not otherwise be able to obtain credit, which would harm the issuer client. These rules protect clients from harm rather than prohibiting a client from requesting competitive terms for products and services or a financial institution from offering favourable Bundled or Preferential Pricing terms to a client. If a commercial lender offers an issuer client the option to retain the services of an affiliate dealer/advisor – and we see this as an over-simplification given the market dynamics described below – this is not an abusive or coercive practice, nor does it harm an issuer client.

Process and Market Dynamics

Not only would it be illegal for a commercial lender to make its services to issuer clients conditional on retaining the services of its dealer/advisor affiliate, or vice versa; it also does not reflect principles of a healthy competitive market. An issuer client is not harmed when they choose to bundle products from a financial institution of their choice. Depending on the situation, an issuer client may choose to deal with one or more financial institutions, or they may seek competing proposals from a broad range of dealers, irrespective of whatever pricing is provided by the relevant affiliated dealer of the issuer client's lender.

The choice of dealer for an issuance is based on a dealer's suitability to the particular needs of the issuer, and issuer clients may choose from many potential service providers including bank-owned Canadian dealers, Canadian or global independent dealers, boutique advisory firms, global universal banks, foreign banks and non-bank lenders (e.g. private capital or alternative lenders). Some of the multiple factors that issuers consider when selecting their underwriters and financial advisors are described below. Whether an affiliate of the underwriter offers credit is typically only one part of the equation, which would be weighted differently by each issuer client based on their preferences and needs.

Unintended Consequences

The Final Report's proposed incremental prohibitions on bank-owned dealers fail to distinguish between harmful coercive practices and healthy competitive practices, and may have the unintended consequences of:

- Limiting an issuer's freedom to choose its service provider in Ontario, by both restricting who an issuer may choose to provide financial services and by forcing an issuer to use a particular category of dealer
- Restricting the right mix of advisory and execution expertise and distribution capabilities for a particular transaction, which impacts both issuers and investors, including retail investors
- Potentially misguided, regressive and excessive intervention with market driven forces that are at the root of a healthy and competitive economy

2. To the extent there is evidence of commercial lenders requesting issuer clients to retain the services of an affiliated dealer or adviser, please explain the nature of the request. Specifically,

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a. Can the request reasonably be characterized as "bundling" of services or "relationship pricing", which is specifically contemplated and permitted by the Bank Act and NI 31-103?

Yes. Clients routinely expect and request the Defined Activity, including Bundling and Preferential Pricing, in the normal course. Participants in the Canadian capital markets compete based on the expectations and requests of issuer clients and offer Bundling or Preferential Pricing. Clients also routinely look to engage financial institutions on specific products and services (i.e. unbundled) and the Canadian capital market participants compete on these requests as well.

Clients are also looking to achieve the optimal cost of capital, expertise and capabilities and they openly negotiate for the best pricing from their lending providers – similar to any other product. Preferential Pricing is determined based on many factors including the competitive dynamics in the market and relate to the particular client at the particular point in time. As noted, Bundling and Preferential Pricing are beneficial to the issuer client and is indicative of a strong, competitive capital market.

b. Can the request reasonably be characterized as a requirement or condition of financing; namely that the commercial lender would only make available a credit facility, or a credit facility at a more favourable cost, if the issuer client retained the services of an affiliated dealer or adviser?

No. As described above, the Prohibited Activity is illegal. The provisions under the Bank Act, securities law and the Competition Act seek to protect market participants from coercive or abusive selling. These provisions are careful not to encroach on the right of a client to negotiate with financial institutions for favourable terms or the ability of a service provider to offer favourable Preferential Pricing and Bundling in order to compete in the market. To the extent Bundling or Preferential Pricing is available to a client within any particular set of circumstances, such practices provide tangible benefits to clients and demonstrate healthy competition that is the cornerstone of a dynamic economy.

Confusing the Prohibited Activity and the Defined Activity risks overstepping by restricting issuers from being able to choose their own service providers, as discussed below or reducing the level of competition in the Canadian capital markets.

c. Did the request require a minimum amount of business be allocated to the affiliated dealer or adviser?

Clients routinely allocate roles in financing syndicates and the allocation of business for a transaction varies based on role and capabilities and in our experience, financial services providers typically accept any such allocation by the issuer. In a Bundled transaction, the client will typically design the syndicate allocations in consultation with one or more financial institutions across the relevant products in such transaction. These allocations are typically based on existing client relationships, the capabilities of the various financial institutions and the decision is ultimately made by the issuer client.

d. Did the request include a condition that the issuer not retain or discontinue the use of services provided by any other dealer or adviser, such as a dealer or adviser affiliated with a competitor of the commercial lender?

Please see our response to question 2(c) above. The composition of a group of financial service providers is determined by the client and is based on numerous factors including existing client relationships, the capabilities of the various financial institutions and other factors. In our experience, the provision of financial services is not made on the condition that the issuer not retain or discontinue the use of services provided by another dealer or advisor.

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3. Some commenters have suggested that, if improper tied selling is occurring, this should be addressed through existing enforcement mechanisms such as the Competition Act, the Bank Act and/or NI 31-103. Do you feel this is an effective way to deal with the potential concerns outlined in this Notice? If not, why not?

Yes, effective enforcement of existing laws should be the first priority before considering new regulatory interventions.

The existing prohibitions with respect to the Prohibited Activity under the Competition Act, the Bank Act and National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations are an effective and sufficient way of dealing with the Prohibited Activity.

Practices that adversely impact competition in the market are subject to challenge by the Commissioner of Competition and staff at the Competition Bureau under the Competition Act. These provisions are actively enforced by the Bureau and adjudicated by the specialized expert Competition Tribunal. There is a body of jurisprudence governing the interpretation and application of these provisions across a wide range of industry sectors, as well as enforcement guidelines and bulletins informing the business and legal communities of the Bureau's enforcement practices. Any incremental rule by the Ontario Securities Commission that would effectively modify the Competition Act's prohibitions for a specific industry sector at the provincial level would introduce confusion and duplication as a matter of law and enforcement practice.

We endorse vigorous investigation, enforcement, and prosecution of existing laws to address any instances of the Prohibited Activity.

4. Some commenters have suggested that the recommendations of the Taskforce contained in the Final Report (reproduced in Appendix A) will, if adopted, restrict issuer choice and negatively impact capital raising and/or simply benefit foreign dealers at the expense of Canadian dealers. Do you agree or disagree with these comments? Please explain.

We agree that the Taskforce's recommendation could have significant negative impacts on Canadian issuers and Canadian dealers. Please see responses below with respect to the Taskforce's proposals on conflicts of interest and restrictive clauses.

The recommendation of the Taskforce contained in the Final Report provides that a dealer would be prohibited from providing capital markets services to an issuer client where a lender affiliated with the dealer previously tied a decision to extend, renew or limit credit to the issuer client on whether the issuer client provides capital markets business to the dealer.

As discussed above, a prohibition that makes access to credit conditional on obtaining services from a dealer affiliate is already illegal on the basis that it may harm issuers. Any incremental prohibition will excessively and unjustly encroach on a client's freedom to choose its service providers and will limit the issuer's freedom to make their own syndicate composition decisions based on its needs and the experience and capabilities of the service providers, negatively impact capital raising in Canada, and benefit foreign dealers at the expense of Canadian dealers.

Issuer Choice

Issuer clients often seek out lending services independently from underwriting or advisory services. Alternatively, (i) issuer clients may obtain all of these services from the same financial institution after considering a number of factors, and may expect value-based pricing. This should not be prohibited by regulation. Even where a bank-owned dealer is positioned to offer the most competitive pricing on a full suite of individual products, issuer clients may have a separate process to engage dealers and often require them to compete for each individual product or service. This practice is reflective of how deeply competitive and client-driven the market in Canada for capital market services is. Any incremental prohibition risks impairing competition by depriving Canadian issuer clients of choice.

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In our view, issuers are capable of evaluating the value offered by any particular financial service provider in any given situation, and of expecting and insisting on Bundling or Preferential Pricing when they choose to source a number of services through a single financial services provider.

Clients determine financial service providers based on what they value in a service provider, whether it be secondary market sales and trading, research, product group coverage, retail distribution capabilities, the ability to offer credit and other banking coverage, or advisory capabilities, etc. In our experience, many issuers maintain a scorecard, assessing these factors and allocate roles on financing and advisory mandates using the scorecard while also considering the specific capabilities of each dealer. Clients determine which services they wish to procure at any given time (advisory, underwriting or credit), and on what basis (e.g. Bundled or stand-alone).

In TD's experience, any Bundling of financial services offered by lending and dealer affiliates is responsive to client needs, expectations and requests. Those clients who prefer to meet their investment banking and credit needs at the same time or from the same source are sophisticated market participants capable of choosing whether to obtain these services from separate service providers or from a bank and its affiliated dealer. The Taskforce recommendation requiring the inclusion of Independent Dealers is, however, challenging from a competition perspective as it limits client choice, would lead to issuers being forced to pay fees to particular dealers, without regard to how the issuer values the capabilities of the dealer, and would impact issuers' ability to choose whether to obtain multiple services from the same organization at a preferential rate and upon what terms. Further, to the extent any financial services provider does offer Bundling of services or Preferential Pricing, this is to the benefit of the client. Advancing regulation that seeks to benefit a particular category of financial service provider is against the interest of issuer clients and competition law is not intended to protect or enhance segments of service providers to the detriment of competition in the market.

It is inconsistent with the principles of competition to deprive issuer clients of the ability to choose which dealers to engage as underwriters of their offerings, which banks to provide them with commercial loans, or which dealers to provide M&A advisory services. The preservation of market-based competition demands that issuer clients have freedom to select underwriters, commercial lenders, and strategic advisors on the basis of reputation, skill, product offerings, industry experience, and competitive pricing.

Ensuring Canadian issuers have access to capital

It is critical for the vibrancy of the Canadian market for issuers to have access to capital as needed. Any incremental prohibition would likely have the effect of impairing competition by depriving Canadian issuer clients of the ability to choose a dealer with appropriate and necessary capabilities in the particular circumstances. If no alternative dealer is able to provide the necessary capabilities, an issuer may not be able to access necessary capital.

- On equity deals, many offerings are done on a bought deal basis, meaning underwriters commit capital in order to effect the deal. In TD's experience, non bank-owned dealers may not have the balance sheets to take large risk positions on these offerings and foreign dealers typically have little or select appetite to commit the necessary capital as part of such deals.
- On debt deals, debt capital market coverage is critical to a successful capital raise. In TD's experience, non-bank owned dealers do not have large DCM franchises which require a large balance sheet in order to support secondary market trading and foreign dealers are limited in their Canadian DCM coverage and distribution.

If bank-owned dealers are prohibited from participating in underwritings as a result of their affiliated bank having provided credit, there may not be dealers with appropriate risk appetite, balance sheets and capabilities necessary to support new issuance and liquid secondary market trading that issuers expect and require. As a result, issuers would be limited in their ability to raise capital in the Canadian

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market. The alternative, as described below, would be for foreign dealers to continue to build the capabilities necessary and therefore become a significant conduit for raising capital in Canada.

Promoting a globally competitive financial services sector

Any incremental prohibition that prevents clients from choosing who delivers the financial services they require and how, risks shifting business away from domestic institutions and toward global competitors. Simply put, when you reduce choice in Ontario, you drive business out of Ontario.

Competition in capital markets is global in nature. Today, Canadian dealers are competing with foreign dealers in the Canadian market. These foreign dealers may be bank-owned dealers that are part of a global universal bank, investment banks or advisory boutiques. As Canadian issuers increasingly look to scale and/or become global players, U.S. and other foreign dealers are becoming more active in Canadian capital markets, both from an underwriting and advisory perspective.

To the extent a bank-owned dealer is excluded from the opportunity to provide capital markets services and an alternative dealer does have the risk appetite, balance sheet and potential capabilities necessary, it is likely foreign dealers. The exclusion can be expected to position foreign bank-owned dealers to win market share in product sectors. In 2021, several foreign dealers placed in the top 10 M&A financial advisors, ECM and DCM league tables by market share based on deal value.

- Where clients have global growth strategies, foreign dealers appear willing to build Canadian capabilities so as to secure opportunities to provide services on a global basis as the issuer expands beyond Canada.
- In the debt capital market, dealers are required to allocate meaningful capital to support secondary market trading, particularly in fixed income securities that are not publicly listed. These capital requirements, in addition to the significant investments in technology and talent needed to trade fixed income securities, position foreign dealers who have such capital, rather than Canadian independent or smaller dealers who may not have sufficient capital, to gain market share if restrictions were placed on Canadian bank-owned dealers to participate in debt underwritings. Issuers in sectors such as technology, utilities, financial services, energy infrastructure and renewables that also have significant needs for both capital and credit may similarly gravitate more to U.S. and foreign dealers if their choice in Canadian financial services providers were restricted. Foreign dealers would be better suited than non-bank owned dealers to provide credit to such issuers and as a result, be the preferred choice of issuer clients.
- Issuers that require certain distribution capabilities offered by bank-owned dealers, or expect their underwriters to support an after-market for the securities that they sell, can be expected to seek out foreign dealers rather than Canadian independents to obtain this value proposition if Canadian financial institutions were restricted in the manner proposed. Restricting Bundling and/or Preferential Pricing by the Canadian bank-owned dealers would undermine the global competitiveness of Ontario's financial services sector to the detriment of Ontario's ability to maintain globally-competitive capital markets and access to financing for local issuers in the long-term.

5. **The Taskforce recommended that the Commission work with the Canadian Securities Administrators (the CSA) to amend National Instrument 33-105 Underwriting Conflicts and/or through the adoption of a local rule to require an independent underwriter in prospectus offerings in circumstances where the issuer would be considered a "connected issuer" to one or more of the underwriters involved in the offering by virtue of any commercial lending relationship between an affiliate of the underwriter and the issuer. Do you agree or disagree with this recommendation? Please explain.**

We do not agree with this recommendation. The Taskforce recommended that the Commission work with the CSA to amend National Instrument 33-105 Underwriting Conflicts and/or through the

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adoption of a local rule to require an independent underwriter in prospectus offerings in circumstances where the issuer would be considered a “connected issuer” to one or more of the underwriters involved in the offering by virtue of any commercial lending relationship between an affiliate of the underwriter and the issuer. This recommendation could have the effect of (i) negatively impacting issuers by denying them the opportunity to determine the most appropriate dealer based on their needs and preferences, (ii) negatively impacting issuers' access to capital, (iii) negatively impacting investors to the extent dealers participate in a transaction without sufficient expertise and capabilities, and (iv) shifting the provision of capital markets services from Canadian dealers to foreign dealers. In addition, in our view the use of proceeds of an offering does not have any bearing on which dealer an issuer client might select and the competitive process they are likely to undertake to select them, or the outcome, pricing or execution of an offering. To the extent there is any conflict of interest, we believe there are more effective ways of addressing any potential conflict of interest resulting from an issuer client receiving credit from the commercial lender affiliate of an underwriter.

In many circumstances an issuer may receive credit via a syndicated loan from many or all of the major banks in Canada. The Taskforce recommendation with respect to connected issuers could have the effect of requiring a specific percentage of all underwriting arrangements to be comprised of non-bank-owned dealers. As a result, in many cases, bank-owned dealers would be excluded from an underwriting syndicate as no bank-owned dealer would be able to satisfy the independent dealer and 20% requirements of the Taskforce proposal. We expect this would impair Canadian bank-owned dealers' ability to participate in many underwritings.

- As discussed above, there may be limits on certain dealers in respect of product suite, distribution capabilities, sector expertise and an ability to allocate meaningful capital to support secondary market trading. Any requirement that independent underwriters must participate in an underwriting, have a particular size of an underwriting or play a particular role such as lead bookrunner in an underwriting as a result of an underwriters' affiliated commercial lender providing credit to the issuer could result in harm to the issuer client by limiting their ability to choose a dealer based on the value proposition that is important to them and without regard to the capabilities of the dealer.
    - It should be noted specifically that with respect to distribution capabilities, limiting Canadian dealers from an underwriting in such a manner could harm Canadian retail investors' ability to participate in offerings as the Canadian bank-owned dealers have the largest full-service and discount retail distribution capabilities.
- As discussed above, many issuer clients use a scorecard of dealers in order to assess the value proposition of various dealers, but also as a guide to allocate fees based on financing and advisory mandates. Any requirement that a non-bank owned underwriter have a particular size of an underwriting or play a particular role such as bookrunner forces issuer clients to pay fees to particular dealers, without regard to how the issuer values the services being provided.
- With respect to investor protection, less extreme measures can address perceived conflicts of interest. Several of the Taskforce's discussion points refer to a potential benefit to an issuer in having advice independent from its lender, and in particular whether this would enhance investor protection. The independent dealer concept is to protect investors, ensuring that an independent dealer provides the view that the pricing of the security is market pricing. Because investor protection is enhanced with service providers with appropriate capabilities, requiring an independent dealer (whether bank-owned or non bank-owned) in a syndicate and in some cases acting as lead bookrunner may have the counterproductive effect of harming investors by adding dealers to a syndicate that do not have the capabilities or expertise in a particular market segment.
- Although these restrictions could have the effect of shifting some market share in certain product areas to Canadian independent dealers, the primary impact of these restrictions may very well be to the benefit of foreign dealers. See discussion above regarding foreign dealer capabilities.

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We note that where an independent underwriter is required under current securities rules and regulations, the underwriter that fills the 20% position requirement is not given a bookrunner title. As a result, the Taskforce's recommendation goes beyond similar existing rules without justification as to why an independent bookrunner is required simply because the use of proceeds being used to repay the indebtedness to an affiliate of an underwriter. Absent harm to the issuer requiring regulation, the choice of lead bookrunner is more appropriately determined by management of the issuer client and their board of directors, which are accountable to shareholders.

Further, the proposed restrictions on syndicate composition are extreme and there are less invasive ways to offer investor protection and manage actual or perceived conflicts of interest, including through existing disclosure practices. Except in egregious circumstances where there is clear bad behavior, a dealer's advice is not impacted by whether or not its affiliate is offering lending services. In addition to disclosure, from a practical perspective, any potential conflict of interest is managed through the use of a syndicate, which requires multiple parties to agree on pricing and execution and does not practically allow any one underwriter to effect an offering that would not be accepted in syndication. Further, in addition to being a significant reputational risk, a deal that is improperly priced will be subject to public scrutiny and litigation risk. Given that there are typically multiple syndicate members involved in a transaction, there are already sufficient points of view taken into account to arrive at fair pricing.

6. The Taskforce also recommended that, where a registered firm provides capital markets services to an issuer and also has an affiliated commercial lender, there should be a ban on certain restrictive clauses in capital markets engagement letters. This includes agreements that restrict a client's choice of future providers of capital market services (as defined above), such as "right to act" and "right of first refusal" clauses, where a commercial lending and capital markets relationship exists. Do you agree or disagree with this recommendation? Please explain.

The Taskforce's recommendation implies that non-bank owned dealers could continue to include the same restrictive clauses that would be banned for bank-owned dealers. We would urge the Commission to carefully consider any policy decision that is meant to directly disadvantage one business model to the advantage of another. It would be arbitrary and contrary to concepts of competition law to permit certain dealers but not other dealers from having these types of clauses.

Further, we do not endorse a universal ban on these restrictive clauses. Our view is that the responsibility for good decision making with respect to whether a particular restrictive clause is appropriate lies with management of the issuer, their advisors and the issuer's board of directors which is accountable to shareholders – absent the Prohibited Activity, there is no policy rationale for regulating this fundamental exercise of good governance by limiting an issuer's choice and disadvantaging a group of service providers for the financial benefit of another.

Any consideration of the Taskforce's recommendation on restrictive clauses in capital markets engagement letters should be carefully considered. To the extent it can be demonstrated that the practice harms issuer clients, we would welcome a comprehensive market study and consultation process.

With respect to the recent reforms by the UK's Financial Conduct Authority regarding the prohibition of certain restrictive clauses in engagement letters (as more fully set out in FCA consultation PS17/13 "Investment and corporate banking: prohibition of restrictive contractual clauses" (the "**FCA Consultation**")) specifically, we note that the FCA Consultation sets out a prohibition on all financial service providers in respect of unspecified primary market deals and M&A. We understand that the FCA reforms were not predicated on whether the issuer has a credit arrangement with a particular financial service provider or its affiliates.

On the contrary, the FCA reforms recognize that the provision of certain ancillary services to clients in connection with a transaction are to the benefit of issuer clients and necessary to the orderly functioning of the market. By way of example, which is expressly permitted by the FCA, access by

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clients to bridge financing would be restricted if the financial institutions providing the bridge financing were not engaged to manage the execution of the 'take-out' transactions. This is due to prudent risk management whereby the financial institutions have confidence that the subsequent 'take-out' transactions will be executed successfully. As recognized by the FCA Consultation, bridge financing (and warehouse financing) is utilized by clients to complete transactions and the client will select the financial institution(s) for the transaction and also engage financial institutions for the related take-out financings. This is done by the client in consultation with the financial institutions in order to achieve optimal execution. These financing transactions are usually syndicated among the client's relationships on terms acceptable to the client and the financial institutions.

The FCA's prohibition applies to a contractual provision which grants a firm (or an affiliated company of the firm): (i) the right to provide any future primary market and M&A services to the client; or (i) the right to provide future primary market and M&A services to the client before the client is able to accept any offer from a third party to provide those services. It does not prevent clauses in an engagement letter that give the right or opportunity to: (i) pitch for future business; (ii) be considered in good faith alongside other providers for future business; or (iii) match quotations from other providers, but which do not prevent the client from selecting the other providers.

7. Are there any other practices that commercial lenders and their affiliated firms are engaging in that are negatively affecting competition in the Ontario capital markets?

None of which we are aware.

8. Are there regulatory changes that the Commission should consider to increase competition for capital markets services in Ontario?

Other than as set out below, we do not think there is currently a need to consider any regulatory change in order to increase competition for capital markets services in Ontario. A competitive capital marketplace benefits everyone – market participants (large and small), issuers, investors, and the economy. Regulation has a role to play but must be analyzed within the specific dynamics of Ontario's and Canada's markets and global position.

In our view, the Taskforce's comment that issuers do not maintain existing relationships with the independent investment dealer or exempt market dealer who intermediated their early capital raising activities is misguided and has the potential to negatively impact confidence in Canadian capital markets. We think the M&A and equity league tables demonstrate an existing vibrancy in the market for dealers that does not result in harm to issuers as a result of banks having the ability to provide credit to issuer clients of an affiliated dealer. For example, in 2021, an independent dealer without a credit product offering finished second in the equity league tables ahead of most bank-owned dealers. We believe this demonstrates that the Canadian capital market is healthy and independent dealers are viable.

While it will not solve the unintended consequences of the Taskforce's recommendation described herein, given the increased activity of global dealers in Ontario, rather than considering the Taskforce recommendations, registration requirements for foreign financial service providers could be considered. There is currently no registration requirement for non-Canadian lenders or investment banks doing business in Canada (in contrast to the United States and potentially soon in Australia). The introduction of a registration requirement for foreign lenders and investment banks in Canada would ensure investors are protected by setting a minimum standard for such entities operating in Canada. This would advance consistency in the OSC's threshold requirements for a foreign dealer entering the Ontario market with the requirements that Ontario dealers face entering the U.S. and other foreign markets.

To the extent the Commission identifies any potential regulatory changes for consideration, we would welcome a comprehensive market study and consultation process based on empirical data. We would also strongly urge that any potential regulatory changes be considered by the CSA where

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possible rather than on a province-by-province basis, which if pursued by Ontario alone, could have a negative impact on the health of Ontario's and Canada's capital markets.

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We appreciate the opportunity to provide these responses to the OSC Staff Notice and would welcome a meeting with the OSC to discuss more fully TD's positions and to answer any questions you may have.

Sincerely,

"Riaz Ahmed"

Riaz Ahmed
President and CEO

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