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January 10, 2022

The Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto ON, M5H 3S8

Re: OSC Staff Notice 33-753
OSC Consultation on Tied Selling and Other Anti-Competitive Practices in the Capital Markets

Dear Secretary:

Canaccord Genuity Corp. ("CGC") appreciates the opportunity to comment on OSC Staff Notice 33-753, OSC Consultation on Tied Selling and Other Anti-Competitive Practices in the Capital Markets ("Staff Notice 33-753"). Staff Notice 33-753 seeks comments from relevant stakeholders to assist the Ontario Securities Commission (the "OSC") in its response to the Honourable Peter Bethlenfalvy, Minister of Finance, to provide an analysis of questions regarding the practice of tied selling raised by the Capital Markets Modernization Taskforce (the "Taskforce") in its Final Report, published in January 2021 (the "Taskforce Report")[1].

By way of background, CGC is the wholly-owned Canadian dealer subsidiary of Canaccord Genuity Group Inc., a leading independent, full-service financial services firm, publicly traded on the Toronto Stock Exchange. Canaccord Genuity Group Inc., through its global subsidiaries, strive to generate value for their individual, institutional, and corporate clients through comprehensive investment solutions, brokerage services, and investment banking services. CGGI focuses its investment banking efforts on global growth companies and raised over $50 billion in capital for such companies in over 370 financing transactions during its fiscal year ended March 31, 2020. CGGI's global equity research group covers almost 1,000 stocks with an emphasis on growth companies.

CGC is Canada's largest independent, non-bank owned, investment dealer registered with the Investment Industry Regulatory Organization of Canada, with over $37 billion in assets under management and over 1,000 employees in Canada. CGC consistently ranks among the top investment banks in the Canadian underwriting league tables and raised over $8.9 billion in capital in over 180 transactions in during its fiscal year ended March 31, 2021. CGC's equity research group covers over280 Canadian companies. Importantly, CGC does not participate in lending syndicates

[1] Capital Markets Modernization Taskforce: Final Report January 2021, available at:
https://www.ontario.ca/document/capital-markets-modernization-taskforce-final-report-january-2021

to corporate issuers in Canada, and CGGI does not own a bank or provide banking services in any of its global businesses.

We applaud the efforts of the Taskforce in seeking ways to modernize Ontario's capital markets system to maintain a vibrant capital raising environment that will support growth companies, encourage competition and innovation, all the while providing robust investor protection. We support many of the recommendations and initiatives raised in the Taskforce Report.

CGC was pleased to provide comments to the Taskforce in connection with its consultation work, and while the Taskforce did not adopt CGC's recommendation that there be enacted a requirement that reserves for independent dealers at least 20% of the interest in all equity syndicates in which a lender to the issuer participates, we believe the Taskforce recommendation represents a workable solution to the ongoing problem of tied selling in Canadian capital markets. Implementation of the recommendation will open the Ontario capital markets to competition and create a more vibrant market for entrepreneurs to access capital.

Tied Selling in Securities Offerings

We strongly supported the Taskforce, and now the Minister of Finance, in taking on the issue of "tied selling" in connection with securities offerings. The practice of commercial lenders with affiliated investment dealers expressly or implicitly conditioning lending services on the receipt of capital markets business, while currently unlawful in Canada, has created significant anti-competitive forces in the Canadian capital markets, to the significant detriment of independent dealers such as CGC. In the past ten years, we have seen a significant reduction in the number of active independent dealers in the Canadian capital markets, with the withdrawal or acquisition of more than 50 IIROC member dealers during that time. The primary cause of the exit from the market by smaller independent dealers is that they are no longer included in Banked owned dealer equity syndicates. These syndicates are now explicitly or implicitly tied to the provision of credit, leaving no room or economics for independent dealers. For example, if one looks at four of the largest IPOs by Canadian companies of 2021, TELUS International (US$1.0 billion), Dentalcorp Holdings Ltd. ($786 million), MDA Ltd. ($460 million), and Softchoice Corporation($402 million), all led or co-led by bank-owned dealers and foreign banks whose affiliates were lenders, Canadian independent dealers made up on average less than 4% of the total syndicate. Excluding larger independents like Canaccord Genuity and others, this average shrinks to about 1.0%. The remainder of the economics are taken up by lenders and foreign banks (who are also often in the relevant lending syndicates). This dynamic is repeated over and over again in equity capital raising by companies with significant credit syndicates. Over the past five years, equity capital raising by companies in more capital-intensive sectors (i.e., those also requiring significant debt capital) has represented about 55% of the overall Canadian equity capital markets activity. The result is independents, in particular smaller independents, being effectively shut out of more than half of the overall Canadian equity capital markets activity.

The exit by smaller independent dealers from the market has resulted in a significant loss in the ability of small, entrepreneurial companies to access the capital markets. The bank-owned dealers simply do not service emerging companies or industries, given their internal risk parameters. We have seen this with the emergence of the Cannabis industry in Canada, and with the return of the natural resources trade, we have seen a significant volume of junior mining companies seek to go public and/or raise capital – these are companies the bank-owned dealers will not service given their risk/reward calculus. The transactions in these emerging industries are simply too small, and the risk these companies take too high, for the bank-owned dealers to participate. Independent securities dealers are critical to early-stage capital formation, and early-stage capital formation is critical to job creation and a robust economy.

OSC's Specific Questions

We have set out below our responses to some of the specific questions posed by OSC in Staff Notice 33-753, however, we believe they are generally interconnected and so a comprehensive solution is called for to address the market imbalances currently in force.

> **Question 1:**
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> **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.**

While we applaud the Minister of Finance in seeking OSC's assistance in evaluating the issue of tied selling, we believe the OSC should undertake a more comprehensive investigation of the matter. Rather than simply asking securities industry participants and the public for submission of evidence of this practice, we believe OSC should utilize its substantial investigative powers to gather evidence from lenders, issuers, and others, based on the information provided to the Taskforce. Industry participants will likely be reluctant to publicly raise these issues in a submission to OSC, for fear of retribution from the banks and damaging critical relationships with lending syndicates. We have seen this reluctance in our informal discussions with executives of issuers. The OSC should seek from banks internal documentation relating to corporate loans, including full lending syndicate packages, internal communications, revenue splits among divisions, and other documentation relating to determination of lending revenue that includes equity and ancillary fees. If loans are meant as a bridge to an equity transaction, we believe banks' internal documentation will often explicitly reference agreed upon economics on future equity capital raising.

As an independent dealer, we do not have visibility into specific examples of tied selling other than what executives tell us, and the empirical evidence we can gather from the marketplace, cited above. In connection with this comment letter, we sought specific evidence from current and former executives of public companies. Some told us tied selling is still explicitly occurring. Many others told us there is an implied condition that issuers will use investment dealer affiliates of their lending syndicates for equity capital raising to achieve the best pricing on their loans. Still others told us they use this dynamic to obtain the best possible pricing from their lending syndicates, effectively the inverse of tied-selling. What remains clear to us is that in all the above cases, **such conduct results in the same damage to the Canadian equity capital markets – exclusion of independent underwriters in equity syndicates due to the competitive power advantage held by Bank-owned dealers.**

Question 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?

We do not agree that enforcement of existing law represents an appropriate remedy to address the market impact of tied-selling. The Bank Act governs conduct of banks and would generally be enforced by banking regulators, rather than by securities regulators such as OSC and IIROC, who have enforcement power over the banks' affiliated securities dealers. In addition, the provisions of the Competition Act are generally enforced by the Competition Bureau, where investigations are triggered either by the Bureau itself or through private third party complaints. We do not believe in either case such remedies to be adequate to address the structural issues in the equty capital markets. Further, we believe the issue is more complicated and nuanced than what is provided for under the Competition Act. Through market practice, if not explicit dialog, the lenders acting as a group divide credit liability and split up equity and M&A fees to ensure the successful syndication of loans. This is a structural problem that has led to a less efficient capital market in Ontario with more limited and weaker participants than would otherwise exist in a truly fair and free market. Given that the practice continues to occur and, as described above, we believe there are broader market structure forces at play, the problem demands a structural solution. We provide comments on these structural proposals below.

Question 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 do not agree that the Taskforce recommendations will have the negative impacts described. We believe issuers will have more choice if the structural issues described above are addressed, permitting issuers more freedom to go outside of their lending syndicates to engage independents. In fact, foreign banks who provide credit and have limited capital markets presence are likely to be the institutions most negatively affected by the proposed amendments. Often, those foreign institutions are ONLY involved in the equity offerings because of their credit, as they have limited to no capabilities in the equity capital raising in Canada. In addition, a market structure that rewards capital raising for earlier stage companies' banks ignore cannot reduce choices for issuers, as more independents will survive and thrive. We believe this dynamic *increases* issuer choice. We do not agree that cost of capital will increase because of the Taskforce recommendations. Bundling of fees benefits the banks as issuers cannot adequately evaluate the cost of services when assessing potential service providers. If tied selling is adequately addressed, equity and debt capital will be priced appropriately. Without tied selling we believe equity commissions will likely be reduced offsetting any increase in credit costs as they have been in other markets around the globe. Canada remains one of the higher cost commission environments globally. Transparency in costs will undoubtedly lead to more efficient markets, more competition, and lower cost of capital.

Question 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 recommended to the Taskforce a structural solution that there be enacted a requirement that reserves for independent dealers at least 20% of the interest in all equity syndicates in which a lender to the issuer participates. That said, the Taskforce's recommendation to presume issuers be "connected issuers" to underwriters whose affiliates participate in lending syndicates represents a solution that could help address the issue of tied selling as there undoubtedly will be more situations in which non-bank-owned underwriters will be engaged. There are some obvious flaws to this approach that we pointed out in our comment letter to the Taskforce, including the ability for bank-owned dealers to engage each other as independent underwriters (assuming not all bank owned dealers are members of the lending syndicate), and the fact that many independent, non-banked-owned dealers, other than ourselves and a few select other independents, would have sufficient capital to act as independent underwriter of at least 20% of larger transactions. Accordingly, while a step in the right direction, and we are fully supportive of taking this step, we would prefer to see a solution that broadly and comprehensively addresses the structural market issues raised by tied selling, such as the one we proposed to the Taskforce.

Question 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.

We support this recommendation although we rarely see these clauses. Notwithstanding these practices are much more nuanced, we broadly agree that firms should compete on the quality, effectiveness, and cost of their services. Rights of first refusal or rights to act, in particular those wholly unrelated to the services provided (such as those that may be contained in lending arrangements), impede free competition and issuer choice. As they have been in other jurisdictions, these should be banned.

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We appreciate the opportunity to provide our views to OSC in connection with its evaluation of tied selling and the Taskforce Report and reiterate our overall support for the recommendations contained in it. We are available to answer questions or discuss any of the above at your convenience.

Sincerely,

Danial Daviau
President and CEO
Canaccord Genuity Group Inc.