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SENT BY ELECTRONIC MAIL

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, ON M5H3S8
comments@osc.gov.on.ca

Dear Sirs/Mesdames:

Re: Request for Submission – OSC Staff Notice 33-753 – OSC Consultation on Tied Selling and other Anti-Competitive Practices in the Capital Markets

We are providing the following comments on OSC Staff Notice 33-753 in response to the request for submission referred to above. While this letter is being provided on behalf of Osler, Hoskin & Harcourt LLP, the views expressed in this letter may not represent the views of all of the lawyers at our firm.

Please note that we previously submitted a comment letter dated September 7, 2020 on the July 2020 Consultation Report of the Capital Markets Modernization Taskforce (the "**Taskforce**"). Our comment letter included a response to proposal 16 in the Consultation Report, which was the original proposal to enact a prohibition on registrants benefiting from tying or bundling of capital market and commercial lending services and to impose a related attestation requirement. We understand that the comment letters responding to the Consultation Report are not readily available to the public and, as such, we have included at the end of this letter our response to proposal 16 as set out in our comment letter dated September 7, 2020, which continues to represent our general views on the topics covered in OSC Staff Notice 33-753.

We are also providing the additional comments set out below.

General Comments

We agree with the Taskforce that facilitating the incubation of entrepreneurial and venture issuers is critical for the growth of our primary market in Ontario. We believe that independent and smaller intermediaries play an important role in achieving this objective.

Independent and smaller intermediaries provide services to emerging issuers that may have fewer financing alternatives at their stage of development as compared with larger and more established issuers. Emerging issuers are often too small or early-stage to be serviced by larger intermediaries. Independent and smaller intermediaries therefore serve an under-financed segment of the market. Those intermediaries often receive higher compensation from issuers in relative terms (in the form of higher cash commissions, equity-based compensation such as broker warrants and more generous expense-reimbursement arrangements) as compared with larger intermediaries. This appropriately reflects the greater risk those intermediaries may take when working with earlier-stage issuers.

Independent and smaller intermediaries play an important role in providing financing and advisory services to emerging issuers. Measured by deal count, much of the recent initial public offering and follow-on offering activity, particularly in sectors such as biotech and pharmaceuticals, cannabis, mining and technology, has, to a large extent, been driven and led by independent and smaller intermediaries. The market for leading public offerings under $25 million in gross proceeds in Canada is dominated by independent and smaller intermediaries. Independent and smaller intermediaries are also strongly represented as lead underwriters in offerings above this threshold, although larger intermediaries tend to have a greater market share of lead underwriter roles in public offerings above the $100 million threshold in gross proceeds.

While many issuers are well-served by smaller intermediaries, some issuers may eventually outgrow the capabilities of smaller intermediaries as those issuers continue to evolve and develop their businesses. In some cases, those issuers may require additional products and services that are not provided by smaller intermediaries, including loans, access to high yield or investment grade debt markets or products to manage interest rate, foreign exchange or other risks. In other cases, issuers may require additional transaction execution capability and experience or access to a larger and more diversified investor base, or may simply develop a stronger relationship with a different intermediary than that which was historically involved in the issuers' earlier financings.

We acknowledge that there are challenges and frustrations for smaller intermediaries when they are unable to continue to assist their growing clients' needs in accessing capital, as noted by the Taskforce. However, we believe this is mainly a function of smaller intermediaries no longer being able to best meet their clients' needs, and not a function of anti-competitive factors such as those identified by the Taskforce.

Smaller intermediaries and larger intermediaries typically serve very different segments of the capital markets, both in terms of issuer size and industry. They have different areas of focus and different strengths, and often do not compete for the same work. Putting aside the ability of some larger intermediaries to offer commercial lending products, we do not believe that the execution capability and experience of smaller intermediaries is generally comparable to that of larger intermediaries, with very few exceptions in the case of some of the largest of the independent intermediaries. As such, we do not believe that the proposals will result in smaller intermediaries being more competitive with larger intermediaries. Smaller intermediaries and larger intermediaries have different core competencies and serve different markets and needs.

We acknowledge that many smaller intermediaries have struggled to survive and that their numbers have been in decline for a number of years. However, we believe that this is the result of a number of factors, including the availability of private or alternative sources of capital, and the fact that industry sectors that have historically driven transaction activity involving smaller intermediaries, such as mining, oil and gas, and more recently cannabis, have been less active due to the challenges facing those industries.

We believe that the hasty introduction of restrictions on the ability of intermediaries to carry out business in an effort to address perceived anti-competitive behaviour is misguided. The proposed measures will not address the concerns of the Taskforce and will only reduce issuer choice with respect to intermediaries and the products and services those intermediaries provide.

Independent Underwriter Requirement

We believe the proposed independent underwriter requirement for prospectus offerings involving a connected issuer, as defined in the proposal, will have no meaningful impact on addressing the Taskforce's concerns with respect to the challenges facing smaller intermediaries. Requiring an independent underwriter in these circumstances is not likely to result in smaller intermediaries being able to better compete for work or continue to help finance issuers that may have outgrown the capabilities of those firms. Instead, this proposal will simply limit the ability of an issuer to choose its preferred underwriters and instead force an issuer to involve an underwriter in its offering with whom the issuer may have no relationship, or no strong relationship, solely to comply with the technical requirements of the proposal. For prospectus offerings involving larger intermediaries, an independent underwriter may well be another large intermediary with no lending relationship with the issuer, rather than an independent or smaller intermediary.

Ban on Restrictive Clauses

We acknowledge that intermediaries of all sizes may request that an issuer agree to a restrictive clause in a capital markets engagement letter, such as a right to act or right of first refusal clause. In our experience, such clauses are often requested, but routinely refused by most medium and large issuers. If anything, we believe that such clauses are more likely to be agreed to by smaller issuers that may have fewer financing alternatives available to them as compared with medium and large issuers.

We do not believe it appropriate for securities laws to regulate the commercial terms of engagements between issuers and intermediaries. However, if it is determined that there should be a ban on restrictive clauses in a capital markets engagement letter, we believe this ban should apply equally to all intermediaries, and not just intermediaries that have an affiliated lender to the issuer. To impose such a ban on intermediaries with an affiliated lender to the issuer would not level the playing field between smaller and larger intermediaries. It would only further entrench the practice of imposing restrictive clauses on smaller and emerging issuers that are already the least likely to be in a position to resist the inclusion of such clauses in their engagement letters.

Excerpt from Osler comment letter dated September 7, 2020 on Taskforce Consultation Report

“We do not agree with this proposal, nor do we agree with the assumptions that appear to underlie it. It appears that the Taskforce has proposed a radical change to the regulation of the Ontario securities market on the basis of anecdotal complaints from independent securities dealers who do not feel they are able to compete effectively under the existing rules of an already robustly competitive marketplace. The Taskforce has not provided any empirical evidence to support the proposition that independent dealers are not in fact fully able to compete with bank-owned dealers, or any review or evaluation of the draconian consequences of the proposed resolution – which would be, by legislative mandate, to prohibit Canadian businesses from having freedom of choice when selecting their commercial lenders and investment bankers. While the proposal is characterized as an effort to “level the playing field”, we believe it is misguided in assuming that handicapping the strongest and most successful Canadian investment banks in their ability to compete fully and fairly for capital markets engagements, in Ontario, in Canada, and globally, is appropriate. One of the potential unintended consequences of adopting this proposal would be to drive capital raising by Canadian issuers into U.S. and other foreign capital markets, at the expense of all dealers in Ontario. The proposal as framed would in fact create an unlevel playing field, raise significant constitutional questions and put the Ontario government and the regulator in a position of power through which it would pick the “winners” and “losers” in what would no longer be a level, competitive market, unjustifiably interfering with market efficiencies.

While ensuring fair competition in the capital markets is a laudable goal, we believe that fair competition can only be achieved through preserving the freedom of choice for Ontario issuers to be able to select which investment banks to hire as their underwriters and which banks to use as their lenders. These choices should be made on the basis of all of the factors that are taken into account by consumers making purchasing decisions in a properly-functioning, fully competitive marketplace, including both price and quality of the services provided. Investment banking and commercial banking services are not commodities, they are professional services where the value that is delivered by one provider may vary significantly from the value provided by another provider. In the case of investment banks, the breadth and depth of industry expertise, the network of relationships with significant investors, the ability to offer analyst coverage and the ability to access investors in other countries through a multi-national or global presence are some of the factors that make investment banking a competitive business. Further, we believe it is in the best interests of issuers to have the opportunity to negotiate for lower costs of capital, and potentially lower interest rates on commercial loans, through "bundling" of investment banking and commercial lending services. Canadian issues must not be deprived of the ability to select their investment banking service providers on the basis of these criteria in the name of "levelling the playing field". The goal of enhancing Ontario's position as a globally respected, world-class capital market would, in our view, be seriously undermined by such action.

We believe that any appropriate concerns underlying the proposal are already sufficiently addressed by existing regulations. In addition to the existing Bank Act prohibition on coercive tied selling referenced in the Consultation Report, tied selling or bundled pricing which has had, is having or is likely to have the effect of substantially lessening or preventing competition may be subject to challenge under the tied selling provisions or the abuse of dominance provisions of the Competition Act. These are provisions actively enforced by the Bureau and adjudicated by the specialized expert Competition Tribunal. There is body of jurisprudence governing the interpretation and application of these provisions across a range of industry sectors as well as enforcement guidelines and bulletins informing the business and legal communities of the Bureau's enforcement practices.

Canada's competition framework includes a pre-existing straightforward method for stakeholders to engage the Bureau and indeed to compel a Bureau investigation into tied selling or bundled pricing practices of any participant in our capital markets.

We do not believe there is a need to duplicate the Competition Act provisions at the provincial level for a specific industry sector and, in fact, such duplication may be confusing as a matter of law and enforcement practice."

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We would be happy to discuss our comments with you. Please direct any questions to Desmond Lee (dlee@osler.com) or James Brown (jbrown@osler.com).

Yours very truly,

"Osler, Hoskin & Harcourt LLP"

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