Ontario government to implement parts of Capital Markets Taskforce report

April 14, 2021

On March 24, 2021, the Ontario government released the 2021 provincial budget (the Budget), in which it announced it would proceed with certain proposals tabled by the Ontario Capital Markets Modernization Taskforce (the Taskforce) in its final report (the Final Report).

In particular, the Ontario government announced it is moving forward with legislative amendments to support the Taskforce's proposals to: (i) expand the mandate of the Ontario Securities Commission (OSC) to include competition and capital formation in order to facilitate economic growth; (ii) separate the OSC Chair and Chief Executive Officer position into two distinct roles; and (iii) separate the board and adjudicative responsibilities of the OSC.

The Ontario government also announced that, as it continues to review the Final Report, it would publish the draft *Capital Markets Act* for stakeholder consultation in the coming months.

See the Ontario government's announcement of the Budget here.

The Final Report, which was published on January 22, 2021, contained the Taskforce's final recommendations to the Minister of Finance to modernize the regulation of Ontario's capital markets. The Taskforce had made 47 policy proposals in its initial report (the Initial Report), which was released on July 9, 2020, and following a 60-day comment period, the Taskforce finalized its recommendations in the Final Report.

See BLG's summary of the Taskforce's proposals in its Initial Report here.

This bulletin outlines the following key recommendations made by the Taskforce in the Final Report, including how they have changed from the Taskforce' Initial Report:

- Expand the mandate of the OSC to include competition and capital formation, and change the name of the OSC to the "Ontario Capital Markets Authority";
- Move to a single self-regulatory organization (SRO) that covers all advisory firms, including investment dealers, mutual fund dealers, portfolio managers, exempt market dealers and scholarship plan dealers;

- Enhance tied-selling restrictions and require the inclusion of an independent underwriter in underwriting syndicates for prospectus offerings;
- Improve corporate board diversity by requiring public issuers to set targets and adopt diversity-related written policies; and
- Mandate disclosure of material environmental, social and corporate governance (ESG) information for all public issuers.

For a summary of how other key recommendations have changed in Final Report compared to the Initial Report, see our comparison chart here.

Expand the mandate of the OSC and change its name to "Ontario Capital Markets Authority"

The OSC's current mandate is to provide protection to investors from unfair, improper or fraudulent practices; foster fair and efficient capital markets and confidence in capital markets; and contribute to the stability of the financial system and the reduction of systemic risk.

In the Initial Report, the Taskforce proposed to expand the OSC's mandate to include fostering capital formation and competition in the capital markets in order to encourage economic growth and facilitate capital raising. The Taskforce also proposed the separation of the regulatory and adjudicative functions at the OSC.

In addition to expanding the mandate of the OSC, in the Final Report, the Taskforce further recommended that the OSC change its name to the "Ontario Capital Markets Authority" in order to better encompass all regulatory activities that the organizational undertakes now and in the future.

While continuing to recommend the separation of the regulatory and adjudicative functions of the OSC, the Taskforce also recommended the separation of the current combined Chair and Chief Executive Officer position into two distinct positions.

In the Budget, the Ontario government announced it is moving forward with legislative amendments to support the proposals to expand the OSC's mandate. It also announced the recommendations to separate the regulatory and adjudicative functions of the OSC and to separate the current combined Chair and CEO position, which would come into effect later in 2021. The Ontario government indicated that these proposed changes represent corporate governance best practices and would instill more confidence in Ontario's capital markets. However, the Budget did not indicate whether the Ontario government would be proceeding with the name change of the OSC, as proposed by the Taskforce.

Move to a single SRO

In its Initial Report, the Taskforce recommended moving toward a single SRO that covers all advisory firms, including investment dealers, mutual fund dealers, portfolio managers, exempt market dealers and scholarship plan dealers. Currently, many dealers operate dual platforms and are jointly regulated by both IIROC and MFDA, resulting in duplicative regulation.

Consistent with its proposal in the Initial Report, the Taskforce proposes the following approach to move towards a single SRO:

- In the immediate term, a new single SRO that regulates both investment and mutual fund dealers should be created.
- In the longer term, following the creation of the new single SRO, the OSC should formally determine whether additional firms directly regulated by the OSC, such as exempt market dealers (EMDs), portfolio managers and scholarship plan dealers, can be added to the oversight by the new SRO.
- In the future, the Taskforce recommends that registration functions for firms overseen by the SRO be delegated by the OSC to the SRO, in addition to the registration functions for individuals of those firms.

Enhance tied-selling restrictions and require an independent underwriter in prospectus offerings

Smaller and independent investment dealers have contended that other dealers that are associated with financial institutions are engaging in practices which may impede competition in securities underwriting work. They give the example of exclusivity arrangements where, as a condition to granting or continuing a commercial loan, a commercial lender requires a client to retain the services of an investment dealer affiliated with the lender for the client's capital raising and advisory needs. This issue has been characterized as "leveling the playing field" as to allow independent dealers to better compete for capital markets work with bank-owned dealers.

In fine-tuning the recommendations from its Initial Report, the Taskforce has now recommended:

- That the tied-selling restrictions in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103) be enhanced so as to prohibit a registrant from providing capital markets services to an issuer where an affiliated commercial lender of the registrant has previously tied a decision to extend, renew or limit credit to the issuer to whether the issuer provides capital markets business to the registrant.
- That a senior officer of a registrant be required to attest that no such prohibited conduct has occurred each time the registrant provides capital markets services to a reporting issuer with whom its affiliated commercial lender has a banking relationship.
- That where a dealer acts as an underwriter in a prospectus offering by an issuer, and the dealer has an affiliate that has a commercial lending relationship with the issuer, there must be an independent underwriter included in the underwriting syndicate as to at least 20 per cent of the offering (or receive at least 20 per cent of the underwriting fees). If proceeds of the offering would be used to pay down indebtedness to the commercial lender, then the Taskforce would require an independent underwriter act as lead or co-lead manager of the offering. These changes would be implemented through amendments to National Instrument 33-105 *Underwriting Conflicts* (NI 33-105) and, in particular, the concept of "connected issuer".
- That certain restrictive clauses in capital markets engagement letters be prohibited, including agreements that restrict a client's choice of future providers

of capital market services, such as “right to act” and “right of first refusal” clauses, where a commercial lending and capital markets relationship exists.

Improve corporate board diversity

In recent years, there has been an increase in attention on diversity on corporate boards and in executive positions. Further, the concept of diversity has expanded beyond gender diversity. For example, recent amendments to the *Canada Business Corporations Act* (CBCA) require all public companies governed by the CBCA to report on representation of, at minimum, the following groups: women, indigenous peoples, persons with disabilities and members of visible minorities.

Since 2014, TSX-listed companies have been required to provide disclosure regarding their approach to gender diversity, including data regarding the representation of women on boards of directors and in executive officer positions. This “comply or explain” model does not require TSX-listed companies to adopt gender diversity policies and practices, such as targets.

In the Initial Report, the Taskforce proposed the following with respect to improving diversity on boards and senior management:

- Require TSX-listed companies to set targets and provide data annually on the representation on their boards and senior management of women, as well as black, indigenous and people of colour (BIPOC).
- Require TSX-listed companies to adopt a written policy respecting the director nomination process that expressly addresses the identification of candidates who are women and BIPOC during the nomination process.
- Set a 10-year maximum tenure limit for directors to encourage an appropriate level of board renewal.

In the Final Report, the Taskforce expands its recommendation to capture all publicly-listed issuers in Canada and expands the applicable diversity groups to include not only individuals who self-identify as women or BIPOC, but also persons who self-identify as persons with disabilities or LGBTQ+. The Taskforce’s final recommendations also increases the 10-year maximum tenure limit to 12 years, and recommends that the board and executive level of the OSC itself represent greater diversity.

The Taskforce’s final recommendations in the Final Report are as follows:

- Require all publicly-listed issuers in Canada to set targets on the representation on their boards and senior management of those who self-identify as women, BIPOC, persons with disabilities or LGBTQ+. The Taskforce further recommends that publicly listed issuers set an aggregated target of 50 per cent for women and 30 per cent for BIPOC, persons with disabilities and LGBTQ+. Implementation of these targets should be completed within five years to meet the target for women, and seven years to meet the target for other diversity groups.
- Amend Ontario securities legislation to require publicly-listed issuers to adopt a written policy respecting the director nomination process that addresses the identification of candidates who self-identify as women, BIPOC, persons with disabilities or LGBTQ+.

- Set a 12-year maximum tenure limit for directors of publicly-listed issuers, with exceptions for: (i) 15-year maximum tenure limit for the chair of the board; (ii) non-independent directors of family-owned and controlled businesses where such nominees represent a minority of the board; and (iii) no more than one other director who will be deemed not to be independent and will still have a 15-year limit. Issuers must implement this recommendation within three years of this amendment taking effect.
- Represent diversity, including racial diversity, at the board and executive level of the OSC.

Enhance ESG disclosure requirements

In the Initial Report, the Taskforce recommended that the disclosure of material ESG information be mandated for all TSX-listed issuers that is compliant with one of two global reporting standards, the Sustainability Accounting Standards Board (SASB) framework or the recommendations from the Taskforce on Climate-Related Financial Disclosures (TCFD).

The Taskforce expanded this recommendation in its Final Report to apply to all non-investment fund public issuers, and suggested that the ESG disclosure be compliant with TCFD.

In the Budget, the Ontario government announced that the OSC would begin policy work to inform further regulatory consultation on ESG disclosure in 2021.

Please contact your BLG lawyer or the authors listed below if you have any questions about the Final Report, the Taskforce's proposals or any of the potential implications for your business.

The authors would like to thank student, Jennifer Jiang, for their contribution to this article.

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