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OSC issues anticipated Report on the Burden Reduction Task Force

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In this Update

- On November 19, 2019, the Ontario Securities Commission (OSC) issued its long-awaited Report on the work of the Burden Reduction Task Force (the Report), in which it outlined the work undertaken by the OSC and the Task Force, aimed at minimizing regulatory burdens and enhancing competitiveness (the Burden Reduction Initiative)
- The Report summarizes a variety of initiatives that have been completed, that have been published for comment, and that are under consideration or for which the OSC has committed to studying in the future
- We highlight some of the main items of the Report

The Burden Reduction Initiative was launched by the Ontario Securities Commission (the OSC) in January 2019 and was aimed at minimizing regulatory burdens and enhancing competitiveness (the Burden Reduction Initiative). Burden reduction in capital markets and financial services has been promoted prominently by the Ontario government, including most recently in its 2019 Economic Outlook and Fiscal Review – A Plan to Build Ontario Together. We have previously written a series of blog posts on our Risk Management and Crisis Response Blog relating to the initiative (see "OSC Burden Reduction Initiative – OSC roundtables," "OSC Burden Reduction Initiative – Rules-based versus principle-based regulation," "OSC Burden Reduction Initiative – Revisiting the 2003 Regulatory Burden Task Force," and "OSC Burden Reduction Initiative – Focusing on 'Principles' for more responsive and effective regulation"), which examined whether, among other things, the Burden Reduction Initiative might result in a less rule-based and more principle-based approach to regulation from the OSC to increase efficiency, flexibility and innovation.

On November 19, 2019, the OSC issued its long-awaited Report on the work of the Burden Reduction Task Force (the Report [PDF]), in which it outlined the work undertaken by the OSC and the Task Force and presented the OSC's recommendations to reduce the regulatory burden for Ontario issuers. This Update highlights some key initiatives in the Report applicable to corporate issuers, investment funds and registrants.

The Report summarizes a variety of initiatives that have been completed, initiatives that have been published for comment and initiatives that are under consideration or for which the OSC has committed to studying in the future. In the Report, the OSC confirmed that its recommendations were guided by the principle of "proportionate regulation," meant to ensure investor protection and confidence in the capital markets, while still being balanced,

tailored, flexible and responsive to different businesses and the evolving marketplace. To the OSC, regulation is proportionate where: costs imposed on stakeholders are commensurate with the benefits; it avoids a "one-size fits all" approach taking into account how regulations affect entities or different sizes; it recognizes there are multiple ways to achieve objectives and includes stakeholder input; and it is frequently updated to support innovation.

At the outset, it is worthwhile noting that the OSC has acknowledged that a rules-based approach to regulation is often too prescriptive. When making rules going forward, the OSC has committed to conducting a deeper and more comprehensive regulatory impact analysis. In particular, the OSC has also committed to engage in targeted consultations with market participants to better understand their concerns about finding the right balance between prescriptive and principles-based rules. Nevertheless, the OSC confirmed that its ideal regulatory approach "involves combining and balancing principles-based rules, prescriptive rules and guidance."

The Report confirms that the OSC intends to continue to walk a line between prescriptive rule-based regulation, and a more principle-based approach, with the ideal regulatory approach in their eyes being a combination of the two. The OSC has also welcomed continued dialogue from market participants on how best to refine this balance in future.

Once again, we applaud the efforts of the OSC to keep Ontario a competitive market for issuers by reducing the overall regulatory burden and seeking harmonization across Canada to foster efficient capital markets while at the same time maintaining their core focus on investor protection.

Set out below are some highlights from the Report.

Mining disclosure pre-filing reviews – Complete

As we noted in our Osler Update in June 2019, the OSC announced the adoption of a pre-filing review regime for mining issuers. The pre-filing review process is intended to reduce execution risk for issuers and investment dealers seeking to launch public offerings under a short form prospectus by providing a means to correct technical disclosure deficiencies prior to commencing a public offering. The pre-filing review regime brought Ontario in line with British Columbia, which has had a formal pre-filing review program in effect since 2009.

Confidential prospectus filing review – 12-month study period in progress

Since 2015, emerging growth companies in the U.S. have been able to confidentially submit a draft registration statement for confidential, non-public review by the U.S. Securities Exchange Commission (the SEC). In 2017, the SEC expanded the confidential submission process to permit confidential pre-filings by all issuers.

The OSC and other securities regulatory authorities in Canada have permitted confidential submissions of a prospectus on cross-border initial public offerings where a confidential submission can be made in the U.S., but have to date, generally not permitted confidential submissions of a prospectus in other situations, such as on a Canadian-only initial public offering. The OSC has announced that it is proceeding with a general program to allow for confidential review of prospectuses prior to an offering to provide issuers and dealers with greater flexibility and certainty over the timing of an offering. Specific rules have not yet been proposed, but allowing confidential submissions of a prospectus in Canada in other circumstances would be a welcome development.

Financial statements – primary business – 24-month study period in progress

The OSC has committed to studying the harmonization of requirements relating to the financial statements that must be included in a long form prospectus relating to an issuer's "primary business". The OSC has historically taken a broader interpretation of these requirements, which has typically resulted in pre-filing discussions with the OSC regarding whether to include financial statements and MD&A for acquired businesses or whether to obtain an exemption allowing the exclusion of such financial statements and MD&A (particularly for smaller acquisitions completed within the past three years). The commitment to study harmonization will hopefully bring some clarity to the issue and move away from the need for exemptive relief for small, non-material acquisitions completed within the three-year lookback period.

ATM offerings – Rule changes proposed

Many issuers have undertaken at-the-market (ATM) offerings – prospectus qualified issuances of shares over the facilities of a stock exchange or other marketplace. However, in Canada (unlike in the U.S.), prospectus delivery obligations have required issuers to seek exemptive relief in order to complete an ATM offering without the need to deliver a prospectus to buyers. In May 2019, the Canadian Securities Administrators (the CSA) issued a notice and request for comment for proposed revisions to the prospectus rules relating to ATM distributions. Comments were requested by August 2019 and the CSA is currently considering those, though the OSC has noted a target completion date in the Report of Fall 2020.

Business acquisition reports – Rule changes proposed

A reporting issuer that is not an investment fund is required to file a business acquisition report after completing a significant acquisition. In addition, an issuer filing a prospectus or information circular where there is a proposed significant acquisition must include similar disclosure in the prospectus or circular. In September 2019, the CSA proposed amendments to the BAR rules to consider a significant acquisition:

- if the result from any two of the three significance tests (asset test, investment test and profit/loss test) exceeds 20% (an increase from only a single test); and
- increase the significance test threshold for reporting issuers that are not venture issuers to 30% (an increase from 20%).

Comments have been requested by December 2019. The OSC has noted a target completion date of this recommendation in the Report of Fall 2020.

Continuous disclosure delivery – 18-month study period in progress

The OSC is studying the development of a comprehensive approach to modernizing delivery requirements for corporate issuer documents and to publishing a concept paper for consultation in conjunction with the CSA. This initiative was announced in Fall 2018 and the OSC has received a number of comments supporting movement to a greater reliance on electronic delivery and "access equals delivery" models, though the OSC notes that such

changes may be subject to investors having the option to request physical delivery. The OSC has not made a recommendation but committed to reporting on the initiative in 2020.

Cost-effective prospectus offerings – 24-month study period in progress

The OSC notes it is studying the development of proposals to make it more cost-effective for issuers to conduct a prospectus offering in conjunction with the CSA. The OSC hasn't provided any details of its work to date or the direction it may be heading, but efforts to make prospectus offerings more cost-efficient are welcome. The OSC has committed to reporting in the fall of 2020.

Blanket orders – Statutory changes proposed

The OSC has requested the ability to issue blanket orders – broad exemptive relief orders applicable to all industry participants, rather than selective orders personal to individual issuers. The OSC is currently precluded from issuing blanket orders as it has traditionally been considered a change in law enacted without relevant notice to market participants. On November 6, 2019, the Ontario government proposed amendments to the *Securities Act* (Ontario) (the Securities Act) that would authorize the OSC to issue blanket orders. The OSC believes blanket orders can reduce costs for market participants and allow the OSC to be more responsive than the traditional rule-making process permits, without any impact on investor protection.

Harmonization – 24-month study period in progress

The OSC is evaluating whether to recommend moving various provisions from the Securities Act into National Instruments to harmonize the placement of these requirements with other jurisdictions. This will be of particular benefit to counsel and other advisors who frequently need to refer to both the National Instrument provision as well as the corresponding Securities Act provision when reviewing the applicable law. The OSC proposes to study the recommendations for a 24-month period from the initial announcement of the initiative.

OSC website update – 12-month study period in progress

The OSC is evaluating updates to the OSC's website, including a plan to prioritize the posting of updated consolidated rules and staff contact information. Unlike the websites of certain other Canadian securities regulators, the OSC's website has not typically maintained easily accessible current consolidated versions of instruments reflecting the various amendments to the law that have been made over a period of time, so maintenance of current consolidations will be a welcome change.

Other initiatives

The OSC has indicated it has received a number of suggestions which it is currently considering, including:

- extending the term of a shelf prospectus to three years;
- streamlining prospectus disclosure requirements;

- introducing automatic shelf prospectus procedures similar in concept to the U.S. Well-Known Seasoned Issuer (WKSI) procedures;
- allowing a qualified person other than the qualified person that prepared a technical report to approve disclosure in a prospectus;
- streamlining the personal information form (PIF) filing requirements; and
- expanding the "testing the waters" exemption for a prospectus offering.

The OSC also noted that they plan to study other suggestions that would mark a significant departure from our existing rules, such as having two years of financial statements in IPO prospectuses instead of three; eliminating the requirement to send a preliminary prospectus; and reducing the withdrawal right in the Securities Act to one business day from two. At this point, no proposals have been presented, but continued review of potential regulatory burdens and paths to reduce or streamline existing processes is very much welcome.

Investment funds and registered firms

The Report identifies several decisions and recommendations to address concerns affecting investment funds. These decisions and recommendations focus on streamlining the investment funds prospectus regime and continuous disclosure requirements, increasing operational flexibility and codifying routine exemptive relief.

As we noted in our posting, "Reducing Regulatory Burden for Investment Fund Issuers – Phase 2, Stage 1," on September 12, 2019, the CSA published for comment CSA Notice and Request for Comment Reducing Regulatory Burden for Investment Fund Issuers – Phase 2, Stage 1, which sets out a series of proposed amendments and changes primarily aimed at removing redundant information in disclosure documents, using web-based technology to provide certain information about investment funds and codifying routine exemptive relief.

In addition, the OSC has also disclosed that it is studying potential options for adoption of the shelf prospectus system by investment funds, alternatives to the annual notice reminder in National Instrument 81-106 – *Investment Fund Continuous Disclosure*, alternative disclosure models for non-IFRS financial statement content, streamlining the material change report process and promoting electronic delivery of continuous disclosure documents.

Of particular note in the Report is the OSC's reaffirmation of the CSA's revised position that collateral/margin posted in connection with the custodial exceptions under section 6.8 of National Instrument 81-102 – *Investment Funds* (NI 81-102) can be rehypothecated, notwithstanding previous statements to the contrary in the Investment Funds Practitioner issued by the Investment Funds and Structured Products Branch of the OSC.

In respect of the new alternative mutual fund regime under NI 81-102, the OSC is finalizing an exemptive relief precedent for how alternative funds obtain leverage while staying within the overall 300% net asset value leverage limit and are developing alternatives to the current proficiency requirements for these types of funds. Generally, for alternative mutual funds, short selling and cash borrowing is limited to a combined 50% of net asset value limit while the remaining leverage must be achieved through derivatives.

The OSC has also developed 30 decisions and recommendations to address concerns associated with burdensome compliance obligations of registered firms, which focus on clarifying and modernizing general compliance requirements including the information registrants must report to the OSC. These include: making OSC compliance reviews more timely and transparent through service standards and better communication with industry; through OSC LaunchPad, providing more support and flexibility when registering FinTech

firms; facilitating the registration of client relationship managers for portfolio manager firms; making it easier for registered firms to implement the CCO function in a manner that aligns with their particular business models, including outsourcing the CCO role (discussed below); streamlining regulatory requirements for registrants that are SRO members and subject to dual regulation or oversight; and reducing the overall number of overlapping Ontario, federal and international requirements.

Chief Compliance Officers – To be implemented

As part of its recommendations applicable to registered firms noted above, the OSC has committed to making changes to the regulatory approach to Chief Compliance Officers (CCOs) at registered firms in Ontario. In conjunction with the CSA, the OSC proposes to permit registered firms to outsource the CCO role to allow a firm to appoint a CCO who is also the CCO of other unaffiliated registered firms. This change will be helpful to small and medium-sized firms as they will no longer be required to employ a full-time CCO on staff, and external compliance experts will be permitted to act for multiple firms at the same time.