Scotiabank's Submission to the Tom Hockin Expert Panel on Securities Regulation in Canada

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"Global co-ordination of regulation must become an integral part of any jurisdiction's regulatory process to mitigate systemic risk and sustain resilient and productive capital markets."

July 15, 2008

Executive Summary

This submission provides Scotiabank's response to the public consultation paper issued by the Hockin Panel on securities regulation. The Hockin Panel has an important mandate to make recommendations on how the federal government can deliver on its objective, set out in *Advantage Canada*, to achieve a Canadian advantage in global capital markets.

The Panel's inquiry is timely, as several global developments – including the global credit crisis – have altered the way in which Canada should look at securities regulation. Jurisdictions that adjust to today's global challenges stand to make significant gains. The right regulatory system is critical for Canada to manage the risks of continued global financial liberalization. The time to act is now, and we encourage the Hockin Panel to make bold recommendations that equip Canada to be a leading jurisdiction.

Our submission is divided into two parts. The first part highlights answers to Panel questions that we regard as fundamental to Canada's long-term economic prospects and that should drive the Panel's overall approach and recommendations:

- Securities regulation in Canada must contribute to the goal of mitigating systemic risks. This will demand a heightened degree of policy co-ordination, both internally and externally, and consolidated prudential oversight of capital markets players.
- Securities regulation must help Canada adapt to globalization. The self-regulatory organization of the securities industry in Canada has just completed a long process of restructuring and adjustment to globalization. Its single, national structure sets a Canadian template for securities regulation in general.
- Securities regulation in Canada must contribute to the competitiveness of Canada's capital markets. Issues of the country's competitiveness can only be addressed by a national regulator that considers the interests of the country as a whole.

The second part of our submission provides answers to all the questions posed by the Panel in its consultation paper. We believe that adoption of a single regulator would help Canada move to a more principles-based system of regulation, would position Canada to be a leader in proportionate regulation and would improve enforcement.

Overall, we believe that the time to propose actionable next steps that will deliver a Canadian advantage in global capital markets is now. We urge the federal government to use the leverage it has over securities regulation to position Canada for success in today's global capital markets.

Scotiabank's Submission to the Hockin Panel

Introduction

Scotiabank, including our fully owned investment bank/brokerage, Scotia Capital, appreciates the opportunity to provide input to the Expert Panel on Securities Regulation (the Panel). For many years, Scotiabank has provided input into the Canadian discourse on securities regulation and also participated in the development of the industry's position through the Canadian Bankers Association (CBA).[1]

The Panel is part of a comprehensive review of Canada's position in the global economy announced by the government of Prime Minister Stephen Harper. The federal government set the right tone in its strategic, long-term economic plan, *Advantage Canada*, which moved beyond macro policies (which Canada has managed very well) to put the spotlight on the micro factors that shape the country's industrial competitiveness in a global economy.[2] The government's competition policy review panel provided sound recommendations for improvements to Canada's competition frameworks, trade and investment policies, and sectoral policies.[3]

The Panel has an important mandate to provide further recommendations that will help the federal government deliver on its commitment "to create a Canadian advantage in global capital markets."[4] Enormous gains stand to be reaped by jurisdictions that are clever and nimble enough to exploit the benefits of globalization while managing the associated risks. The challenge for the Panel is to equip Canada to be a leading jurisdiction in this regard.

In our view, the Panel has posed the key questions about Canada's securities regulatory regime – such as whether it should contribute to reducing systemic risk and support the country's international competitiveness. In addition, the Panel asks whether recent developments have changed how Canada should look at securities regulation. Scotiabank believes that several global developments – including the global credit crisis – have added new dimensions to Canada's long-standing debate on securities regulation. We provide our answers to what we consider the Panel's most important questions in Part I of this submission:

- First, securities regulation must contribute to the goal of global risk mitigation. Achieving this goal requires that securities regulators engage in a heightened degree of cross-border policy co-ordination, strengthen links across national borders, and have the domestic capacity to give effect to those links. Consolidated and prescribed prudential supervision of capital markets players is needed. The current regime cannot deliver these goals – Canada's regulatory fragmentation is becoming a critical drawback at a time when systemic risk mitigation has become one of the most important aspects of capital markets regulation.
- Second, the Panel should take a close look at how Canada's capital markets industry responded to globalization at the self-regulatory level. In essence, the industry moved to a single, national structure that provides a template for how securities regulation can help Canada adapt to globalization.
- Third, capital markets are vital to the health of the economy, and Canada's regulatory regime should be considered a foundation of our global competitiveness. We suggest that issues of competitiveness can best be addressed at the national level by a single regulator.

Part II of this submission provides answers to the specific questions posed by the Panel in its consultation paper.

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[1] Canadian Bankers Association, *Enhancing Canadian Competitiveness by Reforming the Way Securities are Regulated in Canada* (July 2008).

[2] Department of Finance, *Advantage Canada: Building a Strong Economy for Canadians* (2006).

[3] Government of Canada, *Compete to Win*, Final Report of the Competition Policy Review Panel (June 2008).

[4] Department of Finance, *Creating a Canadian Advantage in Global Capital Markets*, Budget 2007, March 19, 2007.

Part I: Recent Developments Demand Securities Regulatory Reform

In this part of the submission, we answer questions posed by the Panel that we consider to be fundamental to Canada's economic future. In our view, a fresh look at securities regulation in Canada is needed in light of several global trends that are profoundly transforming global finance. Those trends might be summarized as follows:

Growth in global capital markets: With a few exceptions, national financial markets have now integrated into global markets, driven by cross-border flows of securities, which have grown tenfold since 1989. The global financial stock has been growing rapidly in size and depth – from $12 trillion (1980) to $53 trillion (1993), and to $118 trillion in 2006. It is projected to exceed $200 trillion by 2010.[5]

Structural change in global markets: Bank deposits are growing more slowly than other tradable (securitized) asset classes. While bank deposits were the dominant asset category in 1980 (45% of the global financial stock), they now represent just 30%.[6] While this change in the structure of the global financial system could be mitigated in the context of re-intermediation, the sheer size of capital markets today demands that regulators focus on the non-bank system.

Global consolidation of markets & players: Borderless markets are forcing financial services providers to compete on a global scale. To illustrate, Canadian companies requiring international debt/equity financing now turn mainly to foreign investment banks that have the necessary scale to provide truly global services (i.e., seven of the top 10 investment banks in the Canadian market are foreign-based and only three are Canadian).[7]

Stock exchanges globalize: Even the largest stock exchanges are engaging in cross-border link-ups, alliances and mergers to better serve the global business community. Examples include the NYSE-Euronext merger, Deutsche Borse-Eurex-ISE amalgamation, and the LSE's acquisition of Borsa Italiana.

While these trends suggest that the benefits of financial globalization remain significant, Scotiabank is keenly aware of the additional risk potential posed by the rapidly growing financial inter-connectedness. The global credit crisis of 2007-08 reveals that markets are much more closely connected than was understood, with at least three profound implications:

- Crises can spread rapidly across market segments via counterparty exposure (justifying the U.S. Fed's historic decision to rescue Bear Stearns and contain broader systemic instability);
- Cross-border infection resulting from the global spread of credit risk via structured products is likely – e.g., the U.S. subprime meltdown caused bank failures in Germany, the U.K., and the non-bank ABCP freeze-up in Canada;
- The speed of market developments has accelerated – e.g., the pullback from Bear Stearns' funds brought a well-capitalized financial institution with an $18 billion capital cushion to its knees in a matter of days.

We believe that Canada, in light of its small capital markets, must be pro-active in analyzing these trends and understanding how the country can take advantage of them. We believe that Canada has much to gain by strengthening its securities regulatory regime to better capture the gains of financial liberalization while managing the associated risks. We highlight below three reasons why a single regulator would help Canada succeed in the global economy of tomorrow – 1. by contributing to global risk mitigation; 2. by helping Canada better adapt to globalization; and 3. by strengthening Canada's competitiveness in global markets.

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[5] McKinsey Global Institute, *$118 Trillion and Counting: Taking Stock of the Word's Capital Markets* (2007).

[6] Ibid.

[7] Institute for Competitiveness and Prosperity, *Assessing Toronto's Financial Services Cluster* (2007).

1. Securities regulation must support global risk mitigation

Scotiabank believes that Canada needs a securities regulatory regime that can contribute to mitigating systemic risk. This need has been highlighted by the ongoing market turmoil. We believe that risk mitigation will demand a heightened degree of co-ordination and crisis management within and among jurisdictions – tasks that are best conducted by a single regulator that speaks with a single voice globally and has the domestic capacity to make its decisions stick.

The global credit crisis has significantly shaped our views in recent months. Our own experience affirms that it is first and foremost private sector players who are responsible to re-establish systemic resiliency by fostering a strong risk management culture. Scotiabank's CEO, Rick Waugh, co-chaired a Special Committee on Market Best Practices at the Institute of International Finance (IIF) that made comprehensive recommendations on how the private sector can mitigate risk and contribute to resiliency. The report was adopted by 380 IIF member banks as a necessary part of the solution to the subprime credit crisis.[8]

Perhaps one of the most important insights Scotiabank gleaned from its work at the IIF is that financial markets are much more tightly integrated across products, sectors and borders than practitioners and academics had understood just 18 months ago. This reality, we believe, has elevated the Guiding Principles of the IIF's *Proposal for a Strategic Dialogue on Effective Regulation* to regulatory priorities.[9] Those principles boil down to the proposition that global regulatory policy co-ordination must become an integral part of any jurisdiction's regulation of capital markets to sustain resilient and productive markets in the future. Regulatory co-ordination will have to become an ongoing process to ensure that international consistency is built into domestic regulation and legislation. Regulatory co-ordination will be particularly necessary in periods of stress and crisis. This view is shared by the International Organization of Securities Commissions (IOSCO):

> "Effective international co-operation will not only protect investors but also reduce systemic risk. Regulators must be in a position to assess the nature of cross-border conduct if they are to ensure the existence of fair, efficient and transparent markets. Regulators must also have confidence in one another."[10]

In order to conduct this regulatory co-ordination, and earn the confidence of international regulators, Canada must do a better job at supervising capital markets from a prudential point of view. The subprime crisis has demonstrated that communication, even among a small number of domestic regulators, can fail. While we agree that IIROC's investigation of Canada's ABCP freeze-up must be completed before final judgments can be made, we argue that there is a need for consolidated and prescribed prudential oversight of capital markets, and that this role cannot be played by 13 provincial regulators.

The Canadian ABCP freeze-up occurred even though the Canadian Securities Administrators (CSA) adopted a mandate to mitigate systemic risk. We believe that the CSA is not equipped to deliver on this mandate. The CSA can only act on behalf of the provinces and does not speak for Canada. The CSA is not a member of IOSCO and has not signed any of the pertinent MOUs on policy co-ordination. Canada's provincial securities commissions have never adopted a mandate to reduce systemic risk and, given their provincial mandates, would not be well positioned to exercise such a mandate.

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[8] Institute of International Finance, *Report of the IIF Committee on Market Best Practices* (July 2008).

[9] For a detailed discussion of those principles – particularly those for global co-ordination of regulation, dynamic assessment of new policy initiatives, and contingency planning as a shared, cross-border obligation of the public and private sectors – see IIF, *Proposal for a Strategic Dialogue on Effective Regulation* (2006).

[10] International Organization of Securities Commissions, *Objectives and Principles of Securities Regulation*, (February 2008), p. 2. We also refer to the speech by Ethiopis Tafara, "Shared Responsibilities in Global Capital Markets, *US Securities and Exchange Commission* (May 8, 2007): "What we have today are global markets with global market participation. But regulation is necessarily national. Since we do not have, nor are we likely to have, a truly global regulator, for international markets to work efficiently, we need national regulators with a global vision. And this necessarily entails co-operation, co-ordination and shared responsibilities in order to promote investor protection and market integrity."

Canada's fragmented regulatory regime has not become the "virtual regulator" promised by the provincial passport system. Instead, it remains fragmented in important aspects that impede effective policy co-ordination – both externally and internally.

1. **Information sharing is ineffective:** Regulatory fragmentation impedes the necessary information sharing and collaborative action among Canada's regulators, particularly during periods of stress and crisis. For example, Canadian capital markets regulators are not represented on the Senior Advisory Committee (SAC) – unlike the U.S. President's Working Group on Financial Markets.[11] Both the IMF and the OECD have stated recently that "a single regulator would allow Canada to respond more quickly to local and global developments."[12]
2. **Policy development is slow:** Policy development in the current system is, by the CSA's own admission, slow and fragmented. The IMF recently affirmed the view of most impartial experts that "a single regulator would streamline policy development."[13]
3. **Credibility and trust is impeded:** Canada's internal co-ordination difficulties impede the trust that Canada must build on the global stage with investors, firms and regulators in other jurisdictions. For example, co-ordination difficulties are visible in the enforcement area and have been well documented.[14] Consequently, Canada portrays an image to the world of inconsistent priorities and varying degrees of investor protection, which confuses international stakeholders. The IMF has commented recently that "the existence of a single regulatory authority responsible for administrative enforcement would help to simplify co-ordination with other enforcement agencies."[15]
4. **Specialized staff and international expertise fail to develop in Canada:** Human resource duplication in the current system prevents the development of specialization. Most of Canada's provincial commissions do not have international offices at all. Some of the larger commissions have small offices, which duplicate each other and fail to develop critical mass.[16]

Canada's experience with the current provincial system illustrates the difficulties Canada will continue to face unless we move to a single regulator. For example, in 2001, the U.S. Securities and Exchange Commission (SEC) was reluctant to continue with the bilateral Canada-U.S. Multijurisdictional Disclosure System (MJDS), citing Canada's byzantine enforcement system and the apparent gaps in investor protection. Only a concerted effort involving considerable bilateral diplomatic efforts saved MJDS. This example illustrates how Canada's system impedes trust and confidence in foreign jurisdictions and leads to perceptions – whether fully justified or not – that Canada is the "Wild West" of securities regulation.

Scotiabank does not argue that a single regulator could have prevented the subprime credit crisis or its spread across sectors, assets and borders. Indeed, it is not realistic to assume that financial crises can be avoided or regulated out of existence – no matter what the structure or nature of the regulator. However, regulatory co-ordination across markets and across borders will have to become an integral part of Canada's securities regulatory regime in the 21st century to mitigate systemic risks – a goal that is substantially impeded by Canada's current regulatory fragmentation. A single securities regulator for Canada is better equipped than 13 provincial regulators to focus on systemic – nationwide – risk and to co-ordinate Canada's responses.

[11] WPC Report, *It's Time* (2003), p. 32. The WPC Report has a whole section entitled "Co-ordination Difficulties," starting on Ibid., p. 28.

[12] International Monetary Fund, *Canada: Financial System Stability Assessment* (February 2008), p. 7. Organization of Economic Development and Co-operation, *Economic Survey of Canada* (May 2008), p. 52.

[13] WPC Report, *It's Time* (2003), p. 30.

[14] International Monetary Fund, *Canada: Financial System Stability Assessment* (February 2008), p. 7.

[15] International Monetary Fund, *Canada: Financial System Stability Assessment* (February 2008), p. 7.

[16] For example, most provincial securities commissions do not appear to have international offices at all, based on information provided on their websites, nor does the CSA have a policy staff to address international issues.

We believe that Canada would be best positioned to face the global market realities of today if the federal government:

1. **Expanded OSFI's mandate immediately to include prudential supervision of capital markets players – in effect, creating a market stability regulator for Canada.[17]**
2. **Formalized co-ordination between Canada's prudential regulator and other regulators and agencies (e.g., Bank of Canada) to address issues of systemic risk.**
3. **Established a single market conduct regulator through federal legislation (that would come into force after a two-year transition period unless the provinces form a single market conduct regulator).**

The expansion of OSFI's mandate to create a single prudential regulator and the creation of a separate national market conduct regulator is essentially the Australian "twin peaks" model. The benefit of this model is that the objectives of the two regulators are clearly delineated, eliminating the possibility that the functions could come into conflict. It will be important that there be significant co-operation and information sharing between regulators (as discussed later in this submission), but the distinct responsibilities of prudential and market conduct supervision will allow for greater efficiency and more effective regulation.

We believe that these changes can be implemented without significant disruption or costs. We do not believe that substantial cost savings will result from the changes, nor do we believe that costs should substantially increase. We believe that additional capital markets capacity will need to be developed in the case of OSFI, but this cost can and should be carefully managed, perhaps with a re-allocation of existing resources from provincial commissions such that cost increases would only be on an incremental basis. Similarly, the single market conduct regulator would not require a different cost structure.

Scotiabank urges the Panel to consider our central argument that these reforms are necessary to position Canada best to mitigate systemic risk. Having a regulatory regime that is optimally positioned to reduce systemic risk is an overriding objective of national interest.

2. Canada's securities industry SRO adapts to globalization

Regulating effectively in today's global markets is a challenge that the Canadian securities industry understands first-hand from its restructuring to a single, national self-regulatory organization (SRO). Now that the SRO is in place, we believe that it has set a concrete model in favour of national regulation. This template can and should be applied to Canada's securities commissions – whose insistence on a passport model is inconsistent with their support for a single SRO.

In 1995, the Investment Dealers Association (IDA) operated without official recognition as an SRO. A staff of 77 oversaw the financial condition and business conduct of approximately 105 investment dealers, then representing 60% of the total. There were four Canadian stock exchanges located in Toronto, Vancouver, Calgary and Montreal, each regulating its own marketplace and a select number of investment dealers.

[17] The market structure in Canada has undergone considerable change in the last decades as financial integration among banks, insurance companies, securities dealer and trust companies has essentially removed what was known as the "four pillars" structure. The large financial services groups in Canada now offer financial services that cut across the four pillars – removing the argument in favor of having regulators that correspond to those pillars. Canada was a leader in adapting to this new reality by merging banking and insurance supervision, following the Estey Commission of 1987. However, due to provincial resistance, similar progress was not made in securities regulation. The argument in favor of single regulation is particularly strong in Canada because it allows for "real time monitoring" of risks in banking and capital markets (given a market structure where the major brokerages are bank owned). "If there are no structural barriers to putting different types of financial business into one firm, then the argument for consolidated regulation, which allows one body to oversee all aspects of the business of a financial group, is a strong one." See Howard Davies, *Single Jeopardy*, in Quantum – Finance in Perspective, Issue 4, 2008, p. 42.

Globalization fundamentally changed the market realities in Canada. The Toronto Stock Exchange demutualized, spun off its in-house regulator as Market Regulation Services Inc. (RS), and brought all of Canada's exchanges under the TMX Group (TMX). The TMX is competing with electronic exchanges and stock exchanges in foreign jurisdictions for international listings – emphasizing the need for a regulatory level playing field.[18] Issuers, competing for capital beyond provincial and national borders, are pushing for a regulatory level playing field in Canada, and beyond Canada's borders. Investors, preferring the choice of borderless markets, demand investor protection/enforcement mechanisms that do not end at provincial/national borders. We are of the strong opinion that Canada should work towards a global regulatory level playing field in capital markets regulation (such as Basel II in banking regulation). Advocacy for a global level playing field presupposes that we first eliminate Canada's internal inconsistencies, regulatory gaps, unnecessary complexities, and opportunities for regulatory arbitrage.

Since 1995, the IDA has been responding to the industry's demands for a modernized self-regulatory approach that meets the challenges of globalization by consolidating member regulation into a single, national SRO. At the same time, RS established itself as a single Canadian market conduct regulator, in response to market pressures and the exigencies of effective regulation in global markets. The merger of the IDA with RS in June 2008 created the IIROC – Canada's national self-regulatory organization, which oversees all investment dealers and all trading activity on debt and equity markets in Canada.

The Canadian securities industry has self-assessed the IIROC's move to a single, national SRO and has evaluated the results as clear-cut benefits (see Appendix for a summary of the benefits). As the IIROC has stated in public, its single set of standards, driven by a consistent and harmonized regulatory philosophy, reduces the potential for split jurisdiction, overlapping responsibilities, confusion and regulatory gaps. Scotiabank agrees, and we note that the IIROC's reduction in complexity and creation of greater transparency should facilitate regulatory co-ordination among national jurisdictions.

IIROC has been successful in reducing market risk through its risk-based approach to enforcement. The IIROC calculates a uniform "risk score" for each of its members across the country, which demonstrates that the overall level of risk faced by investors has been declining consistently since 2001. In particular, the risk scores of high-risk member firms are declining.[19] The IIROC's successes with risk-based enforcement should be of interest to the Panel in light of considerable evidence from the U.K. that a single regulator is better equipped than multiple regulators to undertake risk-based supervision:

> "A system of risk-based supervision under which resources are devoted to those firms and areas of business which pose the greatest risk is much more effectively undertaken within a single authority."[20]

It is noteworthy that the IIROC (IDA at the time) was recently reviewed by the CSA, which oversees and approves the SRO's self-regulatory actions on behalf of the provincial commissions. The CSA concluded that the IIROC's processes are "efficient, effective, consistent and fair; that it has adequate staffing, resources and training to perform its regulatory functions."[21] This review by the securities commissions is significant because the IIROC provides a concrete example of national regulation with regional implementation through its offices in Vancouver, Calgary, Toronto and Montreal. Notably, the supposed "disadvantages" of replacing regional with national regulation are hard to discern in this concrete case study. Only the Alberta Securities Commission raised issues relative to the adequacy of the national/regional balance that the IIROC has struck – noting, for example, that one VP was moved from Calgary to Vancouver and that certain technical

[18] Globe and Mail, *Regulators eye more level playing field* (July 1, 2008).

[19] See "IDA Financial Compliance Risk Assessment Model – Risk Score Comparison (2001-2006), at http://www.iiroc.ca/English/ComplianceSurveillance/RiskTrendReport/Documents/RiskScoreComparisonGraph_en.pdf

[20] Clive Briault, *The Rationale for a Single National Regulator*, Occasional Paper 2, (May 1999).

[21] CSA, *Oversight Review Report of Investment Dealers Association of Canada*, (January 2008), p. 2.

questions were referred to experts located in Toronto.[22] We believe that these issues can be addressed. Given the fundamental importance of regional concerns to the provincial commissions' insistence on the passport, the CSA's review is clear evidence that this concern is largely hollow and/or can be addressed.

We urge the Panel to consider this precedent (i.e., the motivations behind the IIROC, the self-evaluated industry benefits, the CSA's audit of the IIROC, and the apparent absence of significant drawbacks) as an empirical template for Canadian securities regulation in general. We note the contrast between the audit of the IIROC ("efficient, effective, consistent and fair") and the fact that Canada's provincial securities regulators are generally seen by independent experts as "needing to improve." According to the IMF:

> "There are gaps in the regulation and supervision of collective investment schemes… Enforcement of securities laws also needs further improvement. In addition, there is scope to improve the co-ordination among the provincial regulators to eliminate gaps and overlaps, and to make efficient use of resources." [23]

Given that the IIROC is essentially pursuing regulatory and enforcement functions delegated by Canada's securities commissions, we conclude that the case in favour of national regulation has now been demonstrated with a concrete Canadian case. In light of the SRO's experience, we can only conclude that it is politics that stands in the way of progress towards a national securities regulator for Canada.

3. Securities regulation as a competitive advantage for Canada

The vitality of Canada's capital markets is of paramount importance to our prosperity. That's why we support the federal government's commitment in *Advantage Canada* to "create a Canadian advantage in global capital markets."

The long-term trend leaves little doubt about the growing importance of the financial sector to the Canadian economy. Scotiabank recently reviewed the share of financial companies in the S&P/TMX Composite Index over the last 30 years, with the following results:

1978 – December 31	17.0%
1988 – December 30	18.3%
1998 – December 31	22.5%
2003 – December 31	31.2%
2007 – May 25	31.3%
2008 – May 25	26.7%[24]

The trends in other jurisdictions are similar and the employment implications have not gone unnoticed.[25] This growth trend explains why authorities around the world seek to support the competitiveness of the sector. Even very large jurisdictions with substantial internal capital markets (such as the U.S.) are asking how they can boost their capital markets' competitiveness.

For a small economy like Canada's, this focus is absolutely essential, given:

[22] Alberta Securities Commission, *2006 Oversight Review, Investment Dealers Association of Canada, Prairie Regional Office* (June 2007).

[23] See IMF, *Canada: Financial System Assessment*, IMF (February, 2008). The headline in the next morning's *Toronto Star* read: "IMF gives low grade to market regulators – Canadian banks lauded but finance sector study says watchdogs lack bite." See *Toronto Star* (February 14, 2008).

[24] The credit crisis put a dent into the trend in recent months.

[25] For example, in the U.S., financial stocks' share of the market value of the S&P 500 grew from 8% to 22% over the last 17 years. Over the past century, financial workers' share of U.S. income rose from 2.5% to 10%. See Kenneth D. Lewis, "Bank of America Chief on Changes for Industry, Regulation" in *American Banker* (June, 2008).

Global rankings: While Toronto has in recent years adopted the goal to be one of the top 10 financial centres in the world as measured by the City of London's Global Financial Centers Index, Toronto actually fell from 12th place in 2006, to 13th place in 2007, and to 15th in 2008.[26] Many jurisdictions are working hard to compete, climb the ranks, and reap the employment benefits – some, apparently, with more determination than Canada.

Mining finance: On June 19, the Business News Network (BNN) reported that three Latin American mining companies chose to list on the London Stock Exchange (LSE) in the last 18 months, bypassing Toronto, which bills itself as the world's leading mining exchange. These companies are Antofagasta (one of the biggest conglomerates of Chile), Hochschild of Peru, and a precious metals division of the Pinoles Group of Mexico (the largest silver miner in the world) – with a combined market cap of $22 billion. BNN commented that, measured by market capitalization, London now dominates global mining financing, and is reaping the employment benefits.[27]

"Canadian discount": The federal government's Budget 2007 acknowledges that "it costs Canadian companies more to raise money than for comparable companies in the U.S." [28]

Feeling the competitive pressures first-hand, the industry has for some time advocated that "Canadian securities legislation include as one of its purposes the enhancement of the competitiveness of Canada's capital markets."[29] Unfortunately, the provinces have been unresponsive.[30] Consequently, given their provincial mandate, we conclude that Canada's securities regulators may be structurally incapable of delivering a Canadian advantage in global capital markets.

The Panel should review the structure of Canada's securities regulatory system from the point of view of the country's competitiveness, considering foreign experiences, such as:

1. Australia federalized securities regulation in several stages, following the Campbell Inquiry (1981) and the Wallis Inquiry (1997). Both inquiries were tasked to consider the competitiveness of Australia's regulatory system – e.g., to "make recommendations on the nature of the regulatory arrangements that will best ensure an efficient, responsive, competitive and flexible financial system."[31] A recent review of Australia's experience concluded: "While federalization has involved a highly complex and drawn out legal process, the impact on Australian capital markets has been positive."[32] The review also stated that federalization has improved the efficiency of the Australian capital market, that the national market has grown in size, and that the regional markets have not suffered in absolute terms. Further, Australia has become more effective in prioritizing, mobilizing and deploying resources while eliminating inconsistencies in regulation.
2. Planned U.S. structural reforms are now generally discussed in the context of how fragmented capital market supervision contributed to the credit crisis. However, it is worth recalling that the Treasury's announcement of structural reforms came in June 2007, well ahead of the credit crisis, and that reforms were cast as necessary to reclaim the competitiveness and leadership position of U.S. capital markets. As

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[26] City of London, *Global Financial Centres Index* (February 2008).

[27] BNN, *The Business News with Howard Green*, Special on Latin American Mining, June 19, 2008.

[28] Department of Finance, *Creating a Canadian Advantage in Global Capital Markets*, Budget 2007.

[29] Task Force to Modernize Securities Regulation in *Canada, Canada Steps Up – Final Report*, (October 2006).

[30] The notable exception is the province of Ontario, which, in its 2003 Fall Economic Statement, committed the government to actively pursue the creation of a common securities regulator with, among others, the following goal: "to enhance financial market efficiency, to cut costs for investors and companies, and to attract international investment." It is noteworthy that the B.C. Securities Commission has a mandate to ensure the competitiveness of B.C.'s capital markets – which, in our view, falls significantly short of the need to boost Canada's competitiveness.

[31] See Wallis Inquiry website, at www.treasury.gov.au/

[32] Ralph Simmonds, "The Impact of Federalising Securities Regulation in Australia: A View from the Periphery." Research Study Prepared for the Wise Persons' Committee, *It's Time*, (October 2003).

stated at the time by Hank Paulson: "A rationalized regulatory structure…will help to strengthen our global competitiveness and will contribute to maintaining our capital markets leadership."[33]

We refer the Panel to comments we have made previously to the Wise Persons' Committee, indicating that the regulatory burden is too high and has become a threat to Canada's competitiveness. The three primary causes are well known, widely accepted, and are structural in origin: 1) differing rules among jurisdictions, 2) multiple decision makers, and 3) the excessive volume and complexity of rules and regulation.[34]

In this context, we would like to reference and support the work of the Canadian Bankers Association, which demonstrated that businesses pay a direct cost for Canada's regulatory fragmentation and that this cost is disproportionately born by small issuers. Issuers seeking to raise less than $10 million had issuing costs increase by 7.5% for each additional jurisdiction in which funds were sought.[35]

The Panel should also review the substance of regulation. Pertinent precedents include:

1. The U.K.'s Financial Services Authority (FSA) conducted a major review of its approach to regulation, which resulted in a move to a more principles-based approach. The FSA took this approach because it promised "a more competitive and innovative market place."[36] Studies confirm that the FSA's principles-based approach explains in large part why London is gaining global competitiveness in capital markets.
2. The U.S. Committee on Capital Markets Regulation has studied the competitiveness of U.S. markets and concluded that, based on 13 measures, the competitiveness of the U.S. public equity market has significantly deteriorated in recent years.[37] The U.S. plans to strengthen the competitiveness of its market with a variety of initiatives that include – in addition to structural reform – a review of market regulation, a proposal to strengthen financial reporting, and an initiative to seek more transparency in auditing.

Scotiabank is aware that regulation may have to be precautionary in certain circumstances. The trouble is that well-intentioned regulation can have unforeseen consequences that are essentially negative. The appropriate response to these situations is for regulation to be reviewed periodically to determine whether market forces would be better able to address the issue in the absence of regulatory intervention.

4. Conclusion

To conclude, we commend the Panel for raising fundamental questions of how Canada's securities regulatory regime should be reformed to mitigate systemic risk, adapt to globalization, and boost the country's competitiveness in global capital markets. We urge the Panel to make these fundamental issues the driving thrust behind its recommendations.

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[33] "Paulson for overhaul of US capital market rules" in Dawn (June 27, 2007).

[34] Scotia Capital submission to the Wise Persons Committee (2003)

[35] Canadian Bankers Association, "The Impact of Multiple Regulators on the Cost of Raising Capital for Small and Medium Sized Businesses" http://www.cba.ca/en/content/general/2007%20-%20Securities%20regulators%20SME%20Research%20Report.pdf

[36] See Financial Services Authority, *Principles-Based Regulation: Focusing on the Outcomes that Matter* (April 2007).

[37] US Committee on Capital Markets Regulation, "The Competitive Position of the U.S. Public Equity Market" (Dec 4, 2007).

Part II: Specific Questions Posed By The Hockin Panel

In the second part of this submission, we provide answers to the specific questions posed in the Panel's consultation paper, in light of the fundamental discussion in Part I.

1. Objectives, Outcomes, Performance Measures

Panel Question: *What should be the objectives of securities regulation in Canada? Should Canada have a common set of objectives? Given the current context in global financial markets, should the reduction of systemic risk be an explicit objective of securities regulation? If so, how broadly should it be defined?*

As stated in Part I of this submission, Canada should have a single set of objectives and it should include the mitigation of systemic risk.

The reduction in systemic risk should be broadly defined to include the ability to co-ordinate effectively, internally and externally, and the ability to inspire trust and confidence in the eyes of foreign regulators. It should include oversight of capital markets, defined as the ability to detect emerging capital markets risks (both at home and abroad).

We agree with the Panel that it would be helpful to create a performance measurement framework for securities regulation. Our suggestions for performance and outcome indicators are as follows.

Performance indicators:

1. Canada's securities regulator is in a position to monitor, assess and adequately respond to emerging risks at home and in foreign jurisdictions.
2. Canada's securities regulator is able to engage in pertinent cross-border contingency planning, stress testing, and risk mitigation efforts that are timely, cost-effective, and valuable to foreign regulators and the domestic/global industry.
3. Canada's securities regulator is capable of taking a leading role in developing securities regulatory approaches that are compatible with international best practices in achieving investor protection.

Outcome indicators:

1. Foreign regulators state that Canada's regulatory system inspires confidence and trust.
2. Canada is seen as a model that other jurisdictions want to emulate to develop a regulatory system that is both robust in investor protection and global in its integration with other jurisdictions.
3. International industry shows interest in Canada as a listing market because of its innovative approaches that allow business to expand aggressively and grow sustainable shareholder value without taking excessive risks.

Panel Question: *Are there objectives for Canada that go beyond those defined by IOSCO? For example, should an objective be to enhance the competitiveness of Canada's capital markets?*

We stress in Part I that Canada's securities regulatory regime should aim to enhance the competitiveness of our capital markets. For purposes of performance measurement, we propose the following performance and outcome indictors:

Performance indicators:

1. Canada's capital markets are on a level playing field with other jurisdictions from the point of view of international competitiveness. At a minimum, this includes:
   - Canada's securities laws are no more complex, overlapping, fragmented and costly to comply with than those in other leading jurisdictions.
   - There are no regulatory factors giving rise to a "Canadian discount."
2. Canada's securities regulatory regime must periodically justify its structure and approach to regulation as delivering a competitive advantage in global capital markets. At a minimum:
   - Canada's securities regulatory structure conforms to international best practices among open/developed capital markets.
   - While it is recognized that regulation generally does not "create" competitive companies, outdated securities laws, lagging responses to global trends, and onerous requirements can significantly impede competitiveness. Canada consistently avoids these regulatory "negatives."
3. Canada's securities regulatory regime is mandated to promote the competitiveness of Canadian capital markets (and achieves the objectives set out by the Canadian government in Advantage Canada).

Outcome indicators:

1. Canada is keeping up with the rapid change in global financial regulations.
2. Canada is attracting as many or more international listings as other jurisdictions.
3. Canada is the marketplace of choice for international listings in areas of Canadian expertise (mining, energy, agri-business and financial services).

2. Principles-Based Securities Regulation

Panel Question: *Could a more principles-based approach improve securities regulation in Canada?*

Scotiabank believes that securities regulation in Canada should be principles-based and, where possible, not come with a detailed set of interventionist rules. While we recognize that some prescription will always be necessary (and, indeed, desirable), the balance in Canada today is excessively tilted towards prescription.

Scotiabank is of the opinion that a more principles-based approach to securities regulation could provide improvements for Canada in three areas:

1. Principles-based regulation has the potential to reduce the regulatory burden on companies. Principles-based regulation means that the regulator sets the expected "outcome" but does not prescribe the process by which companies must arrive at the desired outcome. This allows companies to use the most efficient way to comply – which may differ across organizations. It allows companies to reduce the operational burden of compliance without sacrificing the desired outcome. It also ensures that companies are always in compliance with the spirit of the law (which is not always the case where companies are instructed to follow a prescribed process).
2. Global co-ordination of regulatory approaches is easier at the level of principles. Detailed prescription is very difficult to co-ordinate globally. As members of the IIF and the IIROC, we agree strongly with the following statements:
   - Institute of International Finance: *"The wider use of principles-based regulation would be more consistent with international co-ordination than detailed national rule books. The dissatisfaction felt with divergent rules stems from the resulting operational difficulties for firms."*

- Investment Industry Regulatory Organization of Canada: *"We need to fashion a 21st century regulatory system based on the convergence of high-level principles and standards developed internationally. The best approach is for national bodies to work together and promote mutual recognition of principles-based standards as opposed to overlaying divergent, inconsistent regimes."*

3. Overly detailed regulations have proven not to be well suited to maintaining regulatory effectiveness as market practices evolve rapidly. Principles have proven to be better in accommodating rapid market change and innovation.

Panel Question: *Are there areas of securities law or regulation that are overly prescriptive and could benefit from a more principles-based approach?*

Several areas of the law are overly prescriptive, including communication with shareholders, regulations dealing with prospectuses, and registration reform proposals. Our concern with prescriptive regulation is not the outcome that regulators want to achieve. Rather, it is with the operational burden that prescription entails.

We illustrate the issue with regard to the CSA's registration reform proposals, specifically complaint handling. While we fully agree with the principle that all registered firms implement policies and procedures to address client complaints, the CSA's registration reform proposals are excessively prescriptive and the detailed requirements are materially different from what exists under current SRO complaint handling procedures. The issue here is not simply that the CSA is imposing a second layer of regulation on top of an existing layer – it's the prescriptiveness of the second layer. The CSA could materially enhance its effectiveness if it set the principle (or outcome) it expects to see implemented and left it up to the SRO to work with the industry to meet the regulator's goal.

Panel Question: *What core regulatory principles should constitute the foundation of securities law?*

Scotiabank concurs with the FSA's 11 principles and has nothing further to add.

3. Proportionate Securities Regulation

Panel Question: *To what extent is there a need for proportionate regulation in Canada? Should the economic characteristics of a company determine how it is regulated? If so, what should be the economic characteristics? What role could risk analysis play in the regulation of businesses?*

Canada has a long history of proportionate regulation that reflects the bifurcated market (many very small companies, some comparatively large companies). The TSX Venture Exchange, for example, reduces the regulatory burden on small companies with "comply or explain" provisions. In this system, "compliance" is voluntary but "disclosure" is not. Where companies do not comply – and disclose this fact – the market has the information it needs. Together with a risk-based approach to enforcement that focuses resources on the high-risk cases that pose harm to investors, this approach has helped Canada build a highly competitive market in small/micro cap listings. It also has the advantage of keeping the market vigilant (not relying excessively on public oversight).

However, the current approach of tiering companies according to the exchange they are listed on is overly blunt, and largely arbitrary. In particular, market caps are very volatile and some companies that "graduate" to the senior exchange may lose much of their market capitalization, depending on market conditions.

Further, some of Canada's largest companies would benefit from a Canadian equivalent to the U.S. Well-Known Seasoned Issuer (WKSI) regime. Those are companies that, by virtue of their size and investor

interest, attract considerable public scrutiny in the form of analyst and media coverage. Canada should adopt a C-WKSI regime.

We propose that a graduated scale of listing classes be based on a number of factors, including market cap, balance sheet strength, analyst coverage, and riskiness of business, including risk management expertise. We believe that such an approach would demonstrate innovative thinking to the world and could be a competitive advantage for Canada (in particular to attract small cap listings).

Our biggest concern with this approach is that it would reduce transparency if adopted within the current regulatory structure. Current perceptions of Canada's 13 regulators, beholden to local interests, would be exacerbated if "graduated regulation" was administered differently by 13 regulators and practiced in different ways across Canada (with no one understanding all the various forms of graduated regulation across Canada). Surely this would fuel foreign perceptions of a "Wild West" in Canadian securities regulation. Proportionate regulation based on company criteria would work if:

- The graduated scale were to be administered by a single, national regulator. This would ensure that graduated regulation would work uniformly across the country and that accountability would have to rest with one agency.
- The single regulator were to adopt top-notch risk-based enforcement techniques that detect and deal with risks across the graduated spectrum. Those risk-based techniques would have to be transparent to foreign jurisdictions with which we hope to clinch mutual recognition deals.

4. Enforcement:

Panel Question: *What would be the opportunities and risks to enforcement under a more principles-based approach in Canada? Should enforcement action be taken solely on the basis of a breach of principle?*

The central fact about enforcement is that it is no longer a purely domestic matter and that the international dimensions of enforcement are growing rapidly. In today's global economy, it is often unclear where a violation occurred. Securities laws may have been sidestepped in many jurisdictions simultaneously (e.g., electronically), or the interests and policies of two or more jurisdictions may be affected by an enforcement decision.

This central fact is one of the reasons why national jurisdictions will be faced with the need to formalize and implement regularized consultation procedures as to whether, where, how, and on what basis enforcement actions in the global market need to be taken. Such international enforcement actions, in turn, need to be consistent among jurisdictions, based on coherent strategic views of how to co-ordinate enforcement action, with what goals, and how the results are to be assessed.

In order to co-ordinate international enforcement in a cost-effective and efficient manner, enforcement should ideally be formalized through international arrangements that allow most cross-border enforcement problems to be allocated to a "lead investigator." The lead investigator would come to an enforcement solution that would include advice, data and evidence from the "host" jurisdictions that are also affected. The solution proposed by the lead jurisdictions would need to be accepted in all jurisdictions.

Co-ordinated enforcement procedures would also be helpful within Canada. To illustrate, Scotia Securities' investment fund business was recently subject to a review by both a securities commission and by the Mutual Fund Dealers Association. These reviews were not co-ordinated. Consequently, we had to make operational resources available twice. Both reviews addressed the same issues and had substantially the same findings. We do not dispute that both have jurisdiction. However, we suggest that co-ordination

between regulators would benefit market participants, and one regulator should be able to rely on the findings of another, where jurisdictions have to overlap. This co-ordination among jurisdictions would be easier under a single regulator.

Growing private sector involvement in globally co-ordinated enforcement actions is likely to be unavoidable (e.g., banks are already in "gatekeeper" roles with regard to money laundering and provide regulators/Justice Departments with valuable information – such as suspicious transactions, large transactions, and monitoring against official lists of terrorists). If the industry is asked to be a partner in enforcement, we ask, in return, to be dealing with one regulator in Canada, and not with 13.

Enforcement must be principles-based for this approach to work. A globalized financial market place will increasingly need enforcement means and philosophies that are broadly consistent across jurisdictions.

Despite our general support for principles-based enforcement, we note that there are areas of concern. In particular, we are concerned that companies could be at greater risk of being subject to an enforcement action without them knowing that they were not complying with the "requirements." Market timing is an example of a situation where regulators held us responsible when there was arguably no clear breach of securities regulation. Thus, we restate our view that some prescription may always be needed.

Panel Question: *Should the adjudicative function be made independent of the securities regulatory agency? Should a pan-Canadian adjudicative tribunal be established? Would a separate adjudicative tribunal help with the enforcement of principles-based regulation? Would the current system be sufficiently well-positioned to enforce a more principles-based approach?*

Scotiabank concurs with both observations made in the Panel's consultation paper in regard to principles-based enforcement:

- It can strengthen enforcement.
- It can contribute to expansive regulatory powers, since enforcement actions can be undertaken on the basis of broad, subjective principles (that allow/require regulators to make broad judgments).

Given the greater degree of subjectiveness of enforcement action under principles-based regulation, Scotiabank argues that it is imperative that adjudication be independent. The "perception of bias" identified by Judge Coulter Osbourne in the current regime would grow significantly under a more principles-based system. The solution is to resolve it through independent adjudication.

Independent adjudication has already been determined to be too costly to establish for all provinces separately (Coulter Osbourne) and, as such, a pan-Canadian adjudicative tribunal would be needed. A pan-Canadian adjudicative tribunal would complement the move to a single regulator.

5. Securities Regulatory Structure

Panel Question: *What are the strengths and weaknesses of the passport system as it is currently being implemented?*

The main strength of the passport system is its supposed responsiveness to "local" issues. We believe that the IIROC provides a template that achieves national regulation without sacrificing responsiveness to local issues. A single regulator could maintain offices in all provinces – essentially matching the key strength of the passport system.

Scotia Capital already commented on the deficiencies of the passport system in its submission to the Wise Persons' Committee on securities regulation. In essence, even with the passport system in place, the CSA

remains disjointed, duplicative, slow to develop rules and policies, unable to deal effectively with misconduct that crosses provincial borders, and unable to speak with a single voice. We believe that these weaknesses would not be overcome if the provinces adopted a uniform Securities Act, as there would remain 13 different interpretations of that legislation, resulting in substantial uncertainty and differences in application.

We note that there is a further fundamental weakness with the passport system as it is currently being implemented in Canada. The province of Ontario has decided not to proceed with implementation and, hence, there is no reasonable expectation that Canada will ever have a fully functional passport. Also, there is nothing stopping the provinces from opting out of the passport at their discretion. The Panel should be wary of arguments that describe the virtues of a fully implemented passport system. Those arguments are essentially theoretical and do not apply in the Canadian context.

Further, we highlight for the Panel's consideration the fact that the passport system does not even attempt to "unify" the regulatory regime. Rather, the passport system actually cements Canada's fragmentation while trying to offer exemptive relief from the consequences of fragmentation. The difference is critical because exemptive relief can only be provided in some areas (e.g., where filings with one provincial jurisdiction count in all other provincial jurisdictions) but not in other areas (e.g., where laws need to be interpreted, legislation passed, rules made, etc.). To illustrate how the ongoing fragmentation of the Canadian regulatory system continues to affect business negatively, we provide three concrete examples:

A. National Instrument 31-103: NI 31-103 "Registration Requirements" was recently introduced by the CSA to streamline the registration process. Once NI 31-103 is implemented, the test for determining whether a firm or an individual is required to be registered will depend on whether the firm or the individual is engaged in the business of trading as principal or agent. The CSA intends that this new business trigger will result in:

- fewer activities requiring registration,
- streamlining exemptions from registration, since fewer activities will trigger the registration requirements, and
- additional regulation over investment fund managers.

Unfortunately, the CSA has not been able to get provincial consensus on a uniform approach to implement the "business trigger," and therefore has not fully achieved the objectives it announced. In particular, fragmentation persists in the following respects:

- The securities regulators in British Columbia and New Brunswick propose to achieve the desired outcomes by using different terminology and rules than those in NI 31-103.
- Manitoba proposes to retain the current "trade trigger" terminology. This means that firms doing business in Manitoba will still need to monitor whether they have carried out a trade in Manitoba, and if so, whether a registration exemption exists before deciding whether they need to be registered as a dealer in Manitoba.
- Ontario recently released proposed amendments to the Ontario Securities Act that implement the business trigger as expected. However, the proposed amendments also embed the factors for interpreting the business trigger in the legislation using language that is different from the language used in the companion policy to NI 31-103. This means that firms doing business in Ontario may have to consider different factors from firms doing business in other provinces before deciding whether they need to be registered as a dealer in Ontario.

B. British Columbia Securities Commission (BCSC) conditions of registration for investment dealers that trade in the U.S. over-the-counter (OTC) markets: The BCSC recently announced the implementation of rules that will require new policies, procedures, reporting and related actions to be taken by national dealers in relation to trading securities on the U.S. OTC Bulletin Board and Pink Sheets through offices located in British Columbia.

Consequently, a dealer in business across Canada will have to implement significantly different procedures for its offices located in British Columbia or undertake not to trade these securities through its offices in British Columbia.

Dealers do not currently have systems in place that would allow them to differentiate trades based on region. The cost of implementing such as system would probably outweigh the benefit. Consequently, the probable outcome is that dealers will not trade these securities in British Columbia while continuing to trade these securities in all other Canadian jurisdictions.

Given increasingly global markets, this kind of rule making is an excellent example of how a regional approach does not benefit Canada but, in fact, provides a disincentive for global players considering doing business in Canada.

C. Cease traded issuers: The reason for imposing a cease trade order in one jurisdiction should, in most cases, be equally applicable in each jurisdiction in which the issuer is a reporting issuer. Nonetheless, cease trade orders are imposed on a jurisdiction-by-jurisdiction basis rather than on a national basis. As a result, trading an issuer's securities may be permitted in one jurisdiction and not in another jurisdiction. This adds unnecessary complexity to trading in the Canadian marketplace.

These examples show that the CSA is powerless to provide co-ordination where it is up against differences in rule making (as well as differences in legislation and/or interpretation of legislation). The provincial passport cannot address these internal divisions, but, in fact, cements them.

Panel Question: *Which structural model (passport or single securities regulator) would be best for Canada? Which model would best support the adoption of new regulatory approaches, including proportionate regulation and a more principles-based approach?*

As outlined in Part I of this submission, the single regulatory structure is preferable for Canada to 1) mitigate systemic risk, 2) adapt to globalization, 3) achieve a Canadian advantage in global capital markets. A single regulator would be needed to administer a more graduated system of proportionate regulation. It is also better equipped to introduce and manage change (innovation).

We question what some see as a key strength of the current provincial system – "we can innovate at the regional level to try out, with limited risk, ideas and approaches that might later be adopted nationally" (Doug Hyndman). This is, in fact, a fundamental weakness of the Canadian system. The reasons are twofold:

- Within the passport system, innovation creates different sets of rules (even if the experiment if beneficial) and differences reduce efficiency, with no guarantee if or when the difference will be resolved. Thus, "innovation" equals "fragmentation." Under a single regulator, experiments, innovations and pilot projects can be undertaken with much more assurance that a single set of rules, and the associated benefits will be established for the whole market.
- Local experimentation is likely slower, as well, under a passport system as other regulators take a "wait and see" approach, while a single regulator can move more decisively and on a national basis (e.g., while Canada experimented with principles-based regulation, the U.K. took bold measures and is now ahead of Canada).

Panel Question: *What are the opportunities and risks of moving to a single securities regulator? How could a single securities regulator be implemented without being unduly disruptive to the marketplace? In particular, what can be done to effect a smooth transition?*

We believe that the opportunities in moving to a single regulator for Canada are enormous and that the risks are almost entirely on the side of inaction and the status quo.

In particular, Canada needs a securities regulatory structure that can deliver a Canadian advantage in global capital markets – including the following:

- effective internal/external policy co-ordination,
- quickness/decisiveness of response to crises,
- ability to mitigate systemic risk,
- ability to speak with one voice on the international scene,
- ability to inspire confidence/trust in foreign jurisdictions,
- ability to implement a more principles-based approach to regulation in a timely manner,
- ability to administer proportionate regulation based on company criteria, and
- uniform investor protection across the country and efficient allocation of resources.

We believe that previous proposals to move to a single regulator through provincial "opt in" have proven to be too weak to engender provincial participation. In order to move forward, we believe that federal leverage will be needed. We encourage the federal government to use its jurisdiction over securities markets to accomplish two goals:

1. **Prudential regulation: Immediately make OSFI Canada's single prudential regulator with a mandate to supervise Canada's capital markets.**
2. **Market conduct regulation: Establish a single Canadian market conduct regulator by enacting a model common securities act, including provisions for a single Canadian Securities Commission (CSC).**

While OSFI's prudential mandate expansion would become effective immediately, enactment of the legislation establishing the single market conduct regulator could be delayed for a transitional period of, say, two years. During that period, the provinces would have the opportunity to devise their own scheme for a single market conduct regulator, including opting into the Crawford model.

If, after the two-year transition, the provinces did not avail themselves of the opportunity to establish a provincially governed, single market conduct regulator, the federal alternative would come into force – giving Canada, in both cases, a "twin peaks" regulatory structure.

Summary of Recommendations

1. Objectives of Securities Regulation:

- The goals of securities regulation in Canada should be broadened to include the reduction of systemic risk.
- The goals of securities regulation should also include the enhancement of the competitiveness of Canada's capital markets.

2. Principles-Based Securities Regulation:

- A more principles-based approach would improve securities regulation in Canada.
- Specific areas of securities law that are too prescriptive include communication with shareholders, regulation dealing with prospectuses, and the CSA's registration reform proposal.
- The FSA's 11 core principles of securities regulation are adequate and we have nothing to add.

3. Proportionate Securities Regulation:

- There is a need for proportionate regulation in Canada and it should be based on company characteristics.

4. Enforcement:

- Enforcement action can be better co-ordinated across borders under a principles-based approach.
- The adjudicative function should be made independent of the securities regulatory agency, should be pan-Canadian, and would work best with a single regulator.

5. Securities Regulatory Structure:

- The passport system does not even attempt to unify the regulatory structure in Canada by creating a single "virtual regulator." Rather, it cements regulatory fragmentation and attempts to provide exemptive relief from the negative consequences of fragmentation – with only limited success.
- A single regulator would be better positioned to 1) mitigate systemic risk and provide consolidated prudential supervision, 2) help Canada adapt to globalization, 3) and achieve a Canadian advantage in global capital markets. It would also be better able to administer a more graduated system of proportionate regulation and to implement a more principles-based system of securities regulation.

Appendix

Self-Evaluated Benefits of a Single, National SRO

The IIROC has surveyed members about the benefits of a single, national structure and spoken about its modernization publicly. The driving goals, evaluated by the industry in a comprehensive survey as clear-cut benefits, can be summarized as follows:

1. *A uniform level of investor protection:* The IIROC's national mandate and operations across the country ensure that investors can count on the same level of investor protection regardless of where they live.[1] Scotia Capital clients and employees move between jurisdictions and appreciate the benefit of uniform protection.
2. *A uniform level of member regulation:* The IIROC's capital and business conduct rules are uniform across the country, and the IIROC applies these standards in a consistent manner across the country. Member firms are treated even-handedly no matter where they locate, and they cannot play regulatory arbitrage by moving from one province to another. Some 90% of member firms evaluated the uniform approach as a benefit. Member firms evaluated the IIROC's provision of "one-stop shopping" as a benefit.[2] Scotia Capital appreciates the single interface for industry, which reduces complexity and increases transparency and consistency.
3. *Efficient resource and staff allocation:* The IIROC adopted a model of risk-based regulation that allows the SRO to allocate enforcement staff and resources more efficiently and strategically to the most complex and the most serious enforcement cases.[3]
4. *Reductions in regulatory costs:* The move to a single, national SRO produced some cost savings, but those were generally evaluated by members as immaterial. However, members stated that they "do not equate greater efficiency with lower costs, but rather with streamlined, simpler and more effective processes."[4]
5. *No industry opposition:* The move to a single, national SRO was evaluated "unanimously" by member firms as providing benefits to the industry. "Significantly, no firms pointed to any long-term disadvantages, reflected in the virtually unanimous support (some disadvantages were identified but seen as transitional)."[5]

[1] Susan Wohlburgh Jenah, "Self-Regulation: Strengthening, Modernizing and Demonstrating Value" (November 22, 2007).

[2] *IDA Information Circular* regarding the Special Meeting of IDA member firms to consider the proposed combination of the Association and Market Regulation Services Inc. in a new self-regulatory organization, (November 15, 2007), Schedule 5, Summary of Survey, p. 3.

[3] Ibid., p. 8.

[4] Ibid., p. 9.

[5] Ibid., p. 6.