

Via Email

November 11, 2014

Cooperative Capital Markets Regulatory System (CCMR)

Re: comments on the consultation draft Provincial Capital Markets Act (PCMA) and Capital Markets Stability Act (CMSA)

The Investor Advisory Panel (the “Panel”) of the Ontario Securities Commission would like to comment on matters of concern that arise from the proposed consultation draft federal Capital Markets Stability and provincial Capital Markets Acts, released in August, 2014.

The Panel’s mandate includes commenting on matters of relevance to investors in the Province of Ontario, and the proposed new regime to be created pursuant to these Acts is clearly a matter that fits within our mandate.

Given the time frames for comment and the nature of how our Panel operates, it is not possible for the Panel to provide detailed or complete comments on the proposed drafts. Instead, the Panel wishes to make a general comment and reiterate comments it has previously made about the importance of investor protection to the integrity of capital markets in Canada.

As a general comment, the proposed legislation fails to address the major flaws in Canada's investor protection regime. In the absence of significant amendments to the proposed legislation, the new common regulator will continue to: set woefully inadequate standards for the provision of investment advice to Canadian investors; exclude retail investor representation from its policy making and governance; and offer inadequate access to fair, independent complaint handling and binding compensation for aggrieved and harmed investors. It is perplexing to us that, at a time when Canadians are encouraged to look to the capital markets to secure their retirement income, their governments are not taking this opportunity to better level the playing field for their citizens.

More specifically, one of the purposes of the proposed federal Act is

“...(a) to promote and protect the stability and integrity of Canada’s financial system through the management of systemic risk related to capital markets;...”

The proposed Act goes on to speak of systemic risk and systemically risky practices but unlike the industry players and products that are specifically referred to, nowhere is there any explicit recognition that the investor protection regime could affect the stability or integrity of the financial system and require management in an analogous manner.

The draft provincial Capital Markets Act underscores the importance of investor protection in s. 1.

The purposes of this Act are, as part of the Canadian capital markets regulatory framework, to provide protection to investors from unfair, improper or fraudulent practices, to foster fair, efficient and competitive capital markets in which the public has confidence and to contribute to the stability and integrity of the Canadian financial system.

The basic duty owed to clients (investors) and the foundation of the investor protection regime is set out in s. 55

A registrant must deal fairly, honestly and in good faith with its clients.

This standard of behaviour should, however, be contrasted with the duty of an investment fund manager to the fund as stated in s. 56

An investment fund manager must

- (a) exercise the powers and perform the duties of his, her or its office honestly, in good faith and in the best interests of the investment fund; and**
- (b) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances**

Whereas an investment manager must manage the fund in its best interests, a registrant only needs to deal fairly with its clients. Nor is there any standard in the legislation regarding the expected level of competence of the registrant, unlike the case for the fund manager.

The trend for some time has been to devolve more responsibility for Canadians' and Ontarians' financial security to the individual. Fewer are covered by employers' pension plans and more of those that have plans tend to have defined contribution plans, which repose the entire risk of investment with the employees. And various surveys show that Canadians and Ontarians are not, on average, particularly financially literate and have little real understanding of investing. Yet the proposed legislation does not take this reality into account in the above s. 55. Hence, it is our view that the proposed legislation does not create an adequate investor protection regime.

An additional necessity to foster public confidence in the Canadian financial system is to ensure that investors have effective access to an independent and efficient dispute resolution mechanism that provides compensation for misdeeds. At present, OBSI can only recommend compensation when appropriate, but is unable to require it. The only enforceable method of seeking compensation is through the courts, which is very time consuming and expensive, and therefore, not an effective mechanism for most investors.

In January of 2009, the report of the Expert Panel on Securities Regulation in Canada made several recommendations to improve investor complaint-handling and redress mechanisms:

- (endow) a securities regulator with the power to order compensation in the case of a violation of securities law so that the investor would not be required to resort to the courts;
- establish(ment of) an investor compensation fund funded by industry to allow the securities regulator to directly compensate investors for a violation of securities law; and
- (require) mandatory participation of registrants in the dispute resolution process of a legislatively designated dispute resolution body.

The Expert Panel also recommended

...the establishment of an independent investor panel (and) that securities regulators establish a dedicated investor issues group.

The Panel is of the view that investor protection is a systemic issue and must be recognized as such in the proposed federal Act. We also concur with the recommendations of the Expert Panel and recommend that the proposed legislation provide for an adequate dispute resolution and compensation regime and a legislatively created Office of the Investor and Investor Advisory Panel in each of the proposed Acts to ensure that the investors' voices are heard. The Panel also recommends that the duty to clients provisions in the proposed provincial Act be updated to at least the level required of investment managers to investment funds and that an appropriate competency standard be applied to registrants. These recommendations, if acted upon, would enhance investor protection significantly.

As various governments are now in the process of reviewing and renewing their capital markets legislation, it is an ideal time to address the flaws in the proposed legislation. If they are not made as part of the present process, it is unlikely that they will be considered for some time, and practices that presently exist or develop in the future may become systemic risks and the tools to deal with such risks may not exist.

We would welcome the opportunity to respond to any questions you may have regarding our comments.

Connie Craddock
 Chair
 Investor Advisory Panel
 Ontario Securities Commission

cc: Howard Wetston and Eleanor Farrell – OSC
 Frank Allen – Ministry of Finance