

# INVESTOR ADVISORY PANEL

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## **RE: OSC Notice 11-794 – Statement of Priorities, Request for Comments Regarding Statement of Priorities for Financial Year to End March 31, 2023**

The Investor Advisory Panel (IAP) welcomes this opportunity to comment on the Ontario Securities Commission's draft Statement of Priorities ("SoP") for the fiscal year ending March 31, 2023. The IAP is an initiative of the OSC to ensure investor concerns and voices are represented in the Commission's policy development and rulemaking process. Our mandate is to solicit and articulate the views of investors on regulatory initiatives that have investor protection implications.

### **PRELIMINARY COMMENTS**

#### **Too many priorities?**

The OSC's mandate has always been complex, demanding constant and dynamic balancing to protect investors while fostering fair and efficient capital markets. In the wake of the 2008 Financial Crisis, a weighty obligation to help maintain global financial stability was added. Now, the mandate has been stretched further through explicit requirements to foster competition and capital formation.

This enlargement of the OSC's remit has led to a proliferation of priorities, which in turn creates two risks: first, that nothing can get completed in a timely way when the top of the agenda is clogged; and second, that so many competing mandate elements may yield an incoherent mash-up of conflicting priorities. We are concerned that both these risks are manifested in the SoP.

#### **Mandate creep and loss of cultural clarity**

In addition, we are concerned that the SoP gives voice to a notion (at page 5) that the OSC's mandate includes the responsibility to "facilitate investor choice" – an unfortunate phrase associated with industry efforts to continue marketing discredited products that ill-serve investors. We would greatly prefer to see the OSC interpret its mandate as a call to facilitate better financial outcomes for investors through access to products, advice and services aligned with their best interests.

Similarly, we note the SoP's reference to "embedding a culture of burden reduction across the OSC" which is certainly a vital initiative. Conspicuously absent, however, is the affirmation found in previous Statements of Priorities that investor protection forms the heart of everything done at the OSC.

Instead, this year's SoP refers to investor protection as "always a top priority" though several other key priorities are listed as well. If this is meant to signal a cultural shift at the OSC from an overarching focus on investor protection to one of burden reduction (or to the prioritization of both as co-equals), then this should be stated more plainly.

However, we note – as did the Office of the Auditor General of Ontario in its recent value-for-money audit of the OSC – that divergence away from a primary dedication to decisive, evidence-based action on investor protection initiatives in recent years has proved extremely costly for Ontario's financial consumers. In light of that critical finding, the OSC and the government of Ontario should declare unequivocally that investor protection is the *sine qua non* of the OSC's mandate, the defining element of its purpose, and its cultural cornerstone.

### **No measure of progress**

Overall, the priorities articulated in the SoP appear to be broad rather than tightly focused, and the document lacks timelines or performance metrics needed to impart a sense of urgency required by the challenges posed from today's complex financial markets. This is especially true when it comes to investor protection.

In the past, we have urged the Commission to take an agile and timely approach to regulation in order to ensure it remains effective and relevant in times of disruption and change. In our view, projected timelines and specific deliverables would make this document more meaningful by affording the public a way to measure the OSC's success in accomplishing what was promised.

## **THE OSC'S OPERATING ENVIRONMENT**

As acknowledged by the Commission, there are three dominant factors that will continue to put pressure on the organization in the coming months and years: the lasting impact of the COVID-19 pandemic, an enhanced regulatory environment in the wake of the Capital Markets Modernization Task Force, and the ongoing evolution of the investing landscape due to the pace of technological change and innovation in financial markets.

While we recognize the challenges and additional pressures these developments have placed upon the Commission and its staff, we remain tightly focused on priorities that improve investor outcomes in a concrete and meaningful way. Our comments on specifics in the SoP reflect this.

## OVERALL: WHAT'S MISSING

### The new self-regulatory framework

In our view, this is one of the most impactful and important initiatives in development right now. Its execution should be an up-front priority for the Commission, and it should be underscored in this draft.

To reiterate our main areas of concern, the new SRO must ensure directors are truly independent, an investor advisory panel is introduced, and properly resourced, and clear metrics are put in place to communicate and monitor its public interest mandate. A full list of our ongoing concerns regarding the SRO framework can be viewed [here](#).

### Clearly defined goals or action items

The 2021-2022 SoP acknowledged the need to improve retail investor experiences and advance investor protection. However, as we noted in our 2020 comments, the document's approach to these imperatives lacked urgency and specificity as well as hard deliverables and specific target dates. We would like to see more clear and concrete details on specific timelines and outcomes of the planned actions. Otherwise, it will be hard to determine what success looks like upon delivery of these priorities.

While we understand that this is a time of great change and transformation at the Commission, accountability must remain paramount. Measurable goals and objectives are therefore needed to determine whether the organization is successful in achieving them.

### Implications of the broadened mandate

The Commission's expanded mandate to include fostering capital formation and competitive markets has significant implications that should be addressed in the SoP. For example:

***"Fair" capital markets*** - Fulfilling the Commission's mandate to foster fair capital markets will be more challenging with the need to balance an additional mandate of fostering capital formation and competitive markets. The Commission should develop clear and transparent guidelines to communicate how fairness will be maintained under its expanded mandate.

***Stakeholders*** - Given the shift in mandate, we would like to see more specifics about groups referred to as stakeholders in the SoP. The term is used throughout the document without a definition indicating which groups are being referenced or included. That makes it difficult to ensure that the right groups are part of the discussion.

## **Evolution of the Investing Landscape**

The SoP recognizes that the pace of technological evolution and innovation in financial markets has created new challenges for the regulatory system. While the Commission is correct to focus on speculative investments such as crypto assets, we recommend revisiting the reference to such products as those that are “promising higher returns and enable investors to have the necessary tools to make informed decisions.”

We caution against focusing solely on those products promising higher returns, and instead believe the Commission should recognize that, for investors, part of making informed decisions is understanding factors such as costs, the nature of the underlying investments, and management styles.

Offerings such as crypto or ESG products don't necessarily offer higher returns, but are either inherently speculative and, for the most part, are not properly understood by or marketed to retail investors. A key factor driving investor decision-making in such cases is FOMO, fear of missing out.

## **Restrictions on availability of third-party investment funds**

As Canadian banks prepare to comply with the Client Focused Reforms, some have moved to eliminate the offering of third-party fund products to bank clients. It is claimed this move was necessitated by the CFR's new know-your-product requirements, but we see nothing in those provisions to support that conclusion. More likely, in our view, the move was prompted by the CFR requirement that suitability of a proprietary fund would need to be assessed against comparable third-party funds on the bank's product shelf.

It concerns us that the banks' decision to pare down their shelves will result in many investors being offered only the most expensive of funds by their advisors. We would have liked to see this emerging issue reflected in the SoP as it will have significant implications for investor outcomes.

Notably, the Canadian Securities Administrators issued guidance in 2015 on inherent conflicts of interest in situations where captive dealers are distributing products of related or connected issuers. The notice referenced exempt market dealers, however conceptually the same conflicts apply to bank-owned investment and mutual fund dealers who are restricting access to potentially more suitable third-party investment products. In our view, this activity is contrary to both the intent and letter of the CFRs, which require that material conflicts of interest must be addressed when deciding whether products are suitable and in the best interests of clients.

Insistence on these principles is crucial to the CFRs' success. Therefore, we encourage the OSC to make immediate and robust enforcement of the CFRs a significant priority.

## **Oversight of technological innovation**

While the SoP references technological innovation as impacting financial markets, we believe there is a need to evaluate whether financial regulators and the investment industry are adequately resourced to oversee that innovation. Complex skill sets combining knowledge of regulatory requirements, computer science (particularly artificial intelligence and machine learning) and data management are needed to ensure this innovation supports fair and efficient capital markets and competition, without undermining investor protection. Yet, at present, it is unknown whether a sufficient number of individuals with those combined skills exist to meet current needs, and there appears to be no program in place to develop more of this expertise in future.

As the extent and complexity of fintech innovation likely will only grow, and grow rapidly, we have urged the OSC to assess this issue and, if warranted, prioritize capacity development through partnerships with universities and the investment industry.

## **Gamification of trading**

Technology is also changing how registrants engage investors who are now able to trade easily online. The Commission must now be aware of the kinds of information, marketing, and gimmicks being used to push account holders to trade whether or not it is in their best interest.

## **Enhanced public disclosure**

While there is much discussion of novel business models and technologies, there is no reference to the enhanced public disclosure that must necessarily accompany new or more complex products or models. It is incumbent on the Commission to consider and articulate the associated benefits to investors and our capital markets. As such, enhanced disclosure should be mandated by the OSC for investors and the markets.

## **The evolution of data**

The SoP discusses technology at length, however it would be helpful to see the Commission address data and data sharing between financial institutions and how this could contribute to better outcomes for investors.

Regulatory authorities must also work to share data. Notably, the Commission is collecting a significant volume of data and it would be helpful and efficient, where appropriate, to share that data with other jurisdictions where investor protection can be further enhanced.

## **Update on previous years' priorities**

It would be helpful to understand what remains to be done from previous years' work. An overview of this would be an informative and useful addition to future SoPs.

## COMMENTS ON SPECIFIC GOALS

### **GOAL 1 – Promote Confidence in Ontario’s Capital Markets**

In our response to last year’s SoP, we commented on the lack of urgency and specificity in the Commission’s imperatives related to improving the retail investors experience and to advancing investor protection. As noted above, this is again the case for the 2022-2023 document. Specifically, we note:

**1.3 Improve the Retail Investor Experience and Protection** - Any move to broaden consideration of investor perspectives early on in the policy-making process is laudable. However, details matter. This document should articulate how this will be done or with whom as well as how this could impact the implementation of new policy.

Similarly, the reference to timelines and responsive investor research conducted and published would be more helpful if specific topics and outcomes focused on enhancing the investor experience through the research results.

In terms of investor education, we recommend taking steps to ensure that it is included in the provincial curriculum. Ensuring younger Ontarians understand capital markets is becoming more important given that they are typically the target of marketing campaigns for meme stocks and gamified investments.

**1.4 Expand Behavioural Insights and Policy Testing Capabilities** - We recommend that this priority be expanded to include the use of behavioural insights and tools to compliance oversight. This would leverage the extensive work being done in this innovative field to inform and, ideally, improve investor protection at the Commission.

**1.5 Strengthening Dispute Resolution Services for Investors** - For years, we have called on the Commission to address fundamental flaws in the dispute resolution system that continue to impede investor access to redress. Action items related to this goal, however, are nonspecific and the planned outcome is similarly lacking in objectives, timelines or tangible deliverables. We reiterate our recommendation from last year that:

- (a) funds recovered from wrongdoers be designated for distribution to harmed investors in all cases where harm has occurred (except where administering distribution of the funds would be demonstrably impractical); and
- (b) settlement of enforcement proceedings and the final disposition of any order imposing terms or conditions be predicated on payment of full compensation to all harmed investors.

**1.7 Strengthen Oversight of Crypto Asset Trading Platforms and Other Dealers** - While we understand the focus on crypto assets is part of this goal, the focus on increased uptake is limiting. We recommend instead a broader objective focused on redefining the qualifications for exempt market investing as a whole. The SoP misses this opportunity, in our view.

**1.8 Introduce Proposed Rule for Climate Change-Related Disclosures** - While this refers to considering comments on and finalizing the proposed National Instrument, delivery dates for both would be helpful.

**1.9 Reconsider Diversity on Boards and in Executive Roles at Reporting Issuers** - The Commission should take more specific action in setting targets or requirements for listed issuers and registrants. The same conversation has been ongoing about what should be done with respect to diversity on boards, and yet years later we have seen no material changes and instead only more talk. The reference to "developing proposals for enhancing that regime, as appropriate" should focus on changing behaviours.

**1.11 Develop Total Cost Reporting Disclosure for Investors** - The increased use of technology by retail fund managers, dealers, and distributors makes the management of those products more efficient and overall less costly. At the same time, costs remain high for investors and can erode returns and impede progress on investment goals. The ban on DSCs and trailing commissions for OEO dealers is a good, although late, start.

While it will be best to co-ordinate and harmonize total cost reporting for securities and insurance products such as segregated funds, we urge the OSC and its CSA partners to expedite and complete this initiative within their own jurisdiction, even if the insurance industry and its regulators opt to move more slowly.

## **GOAL 2 – Modernizing the Regulatory Environment**

We recommend that the Commission clearly distinguish retail investments and private funds from an oversight standpoint and deal with them differently. Many retail investors hear about private funds and can get access to them. However, they continue to view them in the same way as they view retail funds.

For example, the use of enhanced proficiencies for investment advisors and different or enhanced disclosures to investors, and different compliance requirements, can improve investor information, experience, and protection. It can also address the issue of regulatory burden on certain registrants.

**2.1 Implement an Enhanced Framework for Modernizing Regulation** - This is not clearly defined. What does this mean and why is it important to financial markets?

### **GOAL 3 – Facilitate Financial Innovation**

This includes references to adopting new technologies and improving access as a way to support better investor outcomes. We caution that this can be misleading as it implies the Commission is putting its stamp of approval on some technologies whether or not they are appropriate for investors.

### **GOAL 4 – Strengthen the OSC’s Organizational Foundation**

As mentioned above, the recent value-for-money audit conducted by Ontario’s Auditor-General yielded several recommendations for improvements to the OSC’s policy development and implementation processes. We assume the OSC will prioritize addressing those matters.

We hope these comments will prove useful to the Commission as it considers and sets its priorities for 2022-2023. Please let us know if you require any clarification of, or elaboration on, our suggestions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil Gross".

Neil Gross  
Chair, Investor Advisory Panel