



Canadian Foundation *for*
Advancement *of* Investor Rights
Fondation canadienne *pour* l'avancement
des droits *des* investisseurs

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Robert Day
Senior Specialist Business Planning
Ontario Securities Commission
rday@osc.gov.on.ca

Re: OSC Notice 11-791 – Request for Comments Regarding Statement of Priorities for Financial Year to End March 31, 2022

FAIR Canada is pleased to provide comments on the draft Statement of Priorities (SoP) published by the Ontario Securities Commission (OSC) on November 16, 2020.

FAIR Canada is a national, independent charitable organization dedicated to being a catalyst for the advancement of the rights of investors and financial consumers in Canada. As a voice of the Canadian investor and financial consumer, FAIR Canada advances its mission through outreach and education on public policy issues, policy submissions to government and regulators, and proactive identification of emerging issues and other initiatives.¹

General Comments

Investor Protection - We strongly support the driving principle that investor protection should always be a top priority of the OSC. This priority, in turn, promotes confidence in fair and efficient markets that support economic growth in Ontario and Canada. Ultimately, it reduces the cost of capital for entities needing investors' savings to grow their businesses.

We urge the OSC to maintain focus on investor protection as it seeks to respond to recommendations from the Capital Markets Modernization Taskforce, as well as requests to reduce the regulatory "burden" or costs to industry when participating and accessing capital in our markets.

¹ Visit www.faircanada.ca for more information.

Regulatory Burden - We are concerned that the desire by some to focus on costs as a key determinant in policymaking creates several risks. First, it risks obscuring the fact that regulation is required because the interests of industry and investors do not naturally align. It also risks overlooking the fact that there are numerous conflicts of interests at play that need to be managed and regulated. A focus on costs also tends to ignore the significant power and information imbalance between industry and most retail investors that needs to be flattened. Requirements that seek to address the misalignment, conflicts and imbalances will, by definition, impose a burden and costs on industry. The real aim of modernization and “burden reduction” should not be focused on reducing burden or costs per se, but rather on optimizing regulations to achieve desired outcomes as effectively as possible.

Further, focusing on costs as evidence of burden can also lead to making less optimal policy choices. This is because specific costs to the industry are easier to quantify than the general benefits of investor protection, which can lead to distorted view of the merits of different approaches. In our view, the better approach would be to assess whether regulatory requirements achieve the desired outcomes with the least costs possible. We would also encourage industry’s participation in any cost benefit analysis by suggesting less costly options for achieving smarter regulations that maintain, or even enhance, investor protections.

Engagement with Stakeholders - In addition to supporting smarter regulation (not deregulation), FAIR Canada supports continued engagement with investor advocacy groups, such as FAIR Canada, to gain better insights into the needs and interests of investors, and particularly of retail investors. Industry has far greater resources to bring to bear on any regulatory proposal than the average investor or a few small investor advocacy groups. Continued OSC engagement with investor advocacy groups is therefore critical in trying to redress this imbalance which tends to skew public policy making. In short, developing smarter regulation requires input from all participants in the market, not just industry.

Effects of COVID-19 - We cannot overstate the fact that while financial markets as a whole appear to be largely resilient in the face of the unprecedented economic situation caused by pandemic, many Canadian households are continuing to experience significant hardship and financial jeopardy. We urge the Commission to continue to focus its efforts to minimize further harm to investors, particularly for retail investors, from the on-going economic shocks caused by the pandemic.

This includes continuing to implement the following recommendations made earlier this year by FAIR Canada to:

- Suspend deferred sales charges (DSCs) for Canadians who, because of needing to withdraw savings from mutual funds to make ends meet, would otherwise have to pay significant financial penalties because they were sold products with unfavorable commission structures.
- Provide loan related relief to Canadians who purchased investment products, such as

mutual funds, by borrowing the money to pay for their investment.

- Provide relief to investors invested in registered education saving plans (RESPs), who could incur significant fee penalties, interest charges, or risk that their investment plans be cancelled outright if they fail to make a payment under their plan.²

The ability of investors to access investment savings or suspend investment plan payments without suffering penalties and losses is critical in the current environment. We urge the OSC to continue to focus resources and action in support of these recommendations.

We also recognize that the current low interest rates pose challenges for investors seeking returns that match their needs and plans, and the search for yield could lead to unsuitable investments and/or investors falling prey to fraudulent schemes promising higher returns.

These risks are particularly pronounced for seniors, whose investment time horizon necessitates significant reliance on secure fixed income investments for retirement income. The current low-interest rate environment puts a premium on suitability requirements and proper communications between the investor and representative to clearly identify risks, as well as fraud prevention. It also raises concerns about inadequate forward-looking information, and information regarding debt servicing costs of corporate issuers of debt securities. We urge the OSC to formulate and articulate specific actions to address these concerns.

Lack of Specificity – While we understand the need to be responsive to changes that may arise from the Modernization Task Force’s report later this year, we are concerned that many of the priorities identified in the current SoP lack specific deadlines or measurable outcomes. Many are also qualified using the word “continue,” as opposed to setting specific milestones, while others lack sufficient details to be able to assess meaningful progress. For example, a planned outcome under section 1.3 of Goal 1 – Promote Confidence in Ontario’s Capital Markets is: “Educated investors make more informed decisions.” While we agree with the general thrust of this statement, it is not clear how one should assess “educated” or measure progress against it.

Specific Comments on OSC Strategic Goals

Goal 1 – Promote Confidence in Ontario’s Capital Markets

1.1 Continue Implementation of Client Focused Reforms

Fully implementing the client focused reforms (CFRs) by no later than June 30 and December 31, 2021 remains a critically important priority as it helps better align the interests of industry and investors, and better addresses conflicts of interest that cannot be eliminated within the industry.

² See: [FAIR Canada COVID 19 Financial Relief for Retail Investors: - FAIR Canada](#) and [FAIR Canada Letter to the OSC Re: Covid-19 Relief for Vulnerable Retail Investors Invested in Group Plan RESPs - FAIR Canada](#)

We recommend the OSC focus resources and actions to enable and encourage early adoption by industry, rather than waiting to “operationalize” them on the date they become legally required. In addition to preparing FAQs to assist the industry implement the new requirements, we recommend the Commission raise investor awareness of the new requirements, including what investors can expect from industry post implementation. For example, investors will have the right to expect that conflict of interest will be resolved in their best interest, and not in the interests of the dealing representative. This could be achieved with an awareness raising campaign done through the media and in partnership with investor and industry groups.

Planned actions should also include monitoring implementation through enhanced or focused compliance reviews, and strong enforcement action following implementation for any material non-compliance.

1.2 Implement Mutual Fund Embedded Commissions Policies and Ontario Regulatory Response to Deferred Sales Charges (DSC)

FAIR Canada considers the restrictions on both trailing commissions and DSCs to be critically important priorities. Again, we recommend that the OSC focus resources and actions to encourage and enable early adoption by industry prior to legal deadlines. In short, there is an opportunity for industry to show its capacity to act in good faith and not take advantage of investors while we wait for the law prohibiting them to do so comes into force.

We are also concerned about the lack of details or robust planned outcomes in respect of the OSC proposed DSC rule. In our view, the Commission should prioritize making a rule in 2021. The sooner the proposed rule is made, the more time industry will have to make any needed adjustments to their compensation systems. This in turn should ease some of the regulatory burden as regulators progress towards modernizing fees and removing inappropriate compensation structures.

We also recommend the planned outcomes be strengthened to ensure activities involving the inappropriate sale of DSC mutual funds are investigated and addressed by enforcement action in a timely manner.

1.3 Improve the Investor Experience and Protection

FAIR Canada supports the OSC’s efforts to improve the investor experience and protections and commends many of its initiatives in this area.

However, because retail investors rely extensively on the expertise and integrity of advisers and dealers, we believe the SoP should include proposed actions and outcomes for raising proficiency and conduct standards. In our view, the current CFRs do not fully address concerns raised by investors’ experiences, and we are disappointed not to see any specific actions or planned outcomes on proficiency or conduct standards.

We are also unclear about why the priorities do not address title usage, particularly given that investor confusion with the use of the term “advisor” or “financial adviser” are well known, and that Financial Services Regulatory Authority (FSRA) is currently seeking to implement a new framework to protect the use of certain titles in Ontario.

We recommend the OSC include as a priority action reforms to the use of titles in the industry, including the use of titles with the word “advisor” in it. Many retail investors place undue reliance on this usage, and do not appreciate that the individual they are dealing with is not subject to any of the requirements imposed on an “advisor” registered under securities law. This misuse of an alternative spelling not only misrepresents the proficiency, role, and legal responsibility of the dealer representative, but it is also a practice that results in consumer confusion and harm.

We also note with concern that some securities industry trade associations have requested the FSRA exempt registered dealers and individual securities industry registrants from the regulatory framework proposed under the *Financial Titles Protection Act of Ontario* intended to restrict the use of the titles “financial planner” and “financial advisor”.

1.4 Continue to Expand Systemic Risk Oversight

FAIR Canada is supportive of the OSC’s efforts to address systemic risk and encourages all regulators to work together to be able to better identify, monitor, mitigate and manage systemic risk. The global financial crisis of 2008 is a compelling reminder of the need to have arrangements and tools in place to promote stability and minimize the severity and duration of another financial crisis. Given the interconnectedness of financial and capital markets, it is incumbent that regulators with responsibility for different aspects of these markets work together.

1.5 Bring Timely and Impactful Enforcement Actions

Enforcement of securities laws and regulations is an important priority, and we welcome the OSC’s planned actions to proactively disrupt and mitigate harm to investors. However, the proposed OSC actions appear generally to describe the continuation of existing enforcement initiatives, rather than introduce new measures to improve enforcement outcomes.

FAIR Canada encourages the OSC to prioritize investor redress in its enforcement actions, including focussing resources on returning money to harmed investors. We also recommend the OSC work with the Modernization Task Force and Government to introduce a statutory process that supports the distribution of disgorged funds to harmed investors. As the Modernization Task Force stated:

It is important for investor protection in Ontario and is vital to the trust and confidence people have in the capital markets and in the OSC’s enforcement capabilities. It is important that ill-gotten gains recovered through the OSC’s collection efforts be distributed to the investors who were harmed, as investors may not be able to independently recover from the respondent.

1.6 Continue Consultation on the Current Self-Regulatory Organization (SRO) Framework

Pending the on-going consultation process, we recommend the Commission consider requesting that the SROs prioritize:

- Enhancing investor and public representation on their boards, regional councils, and advisory committees.
- Amending their rules to clarify that compensation should be a pre-condition for consideration of credit for cooperation in their settlement agreements.
- Amending sanction guidelines applicable to SRO disciplinary proceedings of dealers and individual registrants to encourage compensation of harmed investors.

1.7 Strengthen Investor Redress through Ombudsman for Banking Services and Investments (OBSI)

We support and fully agree with the OSC's statement that:

Avenues to obtain investor redress, including an effective and fair dispute resolution system, are now regarded as an essential element of investor protection frameworks. To achieve better results for investors, the OSC will continue its efforts to strengthen OBSI in its role as the independent dispute resolution service.

The need for a more effective and fair dispute resolution system by strengthening the OBSI is a longstanding recommendation of FAIR Canada. Given industry resistance to bring about improvements voluntarily, regulatory reform is needed to address worrying investor experiences in this area. As recommended by the Modernization Task Force, we support giving OBSI binding decision-making authority and increased limits.

We are very concerned, however, with the on-going delays and lack of concrete action by regulators to address this issue in the interim. Industry's continued push-back on OBSI recommendations is simply unacceptable. Not only does it create further injury to harmed investors, but it also continues to erode trust and confidence in our capital markets. This erosion is even more vexing given that industry advocated for the current system to block efforts intended to create a statutory ombudsman regime in Canada. The sentiment expressed by industry at the time was that they could be trusted to deal with complaints on a "voluntary basis" and in a responsible and fair manner. The lack of any concrete action to date on this serious problem is alarming.

Pending the potential adoption and implementation of binding OBSI recommendations, we recommend the OSC use its public interest authority whenever possible, including by identifying and calling out firms that habitually make "low-ball" offers of settlement to investors or refuse OBSI's recommendations. This practice by some in the industry is troubling given that several

independent evaluations found OBSI's loss calculation methodology to be best in class when compared to its international peer group.

We also recommend the OSC prioritize examining other means of providing compensation to harmed investors. Canadians victimized by fraud, misrepresentation, misleading sales practices, and unsuitable investment advice suffer devastating losses that have serious impacts on their financial well-being and lives. We recommend the OSC prioritize examining its practices regarding restitution orders and ways it could improve the use of such orders.

Goal 2 – Reduce Regulatory Burden

2.1 Complete Actions Identified in the OSC Burden Reduction Plan

As noted above, we have concerns with the focus on “burden reduction,” as opposed to optimizing regulatory requirements and the alignment of investor and industry interests.

To the extent the OSC continues to focus on burden reduction, then we would invite the Commission to consider the burden imposed on investors, particularly in situations where they are seeking financial redress caused by the misconduct of a market participant. The burden is particularly acute for investors that may have to choose between a low-ball settlement offer, no offer at all, or paying expensive legal fees to get their day in court.

In our view, the current legal avenues present significant barriers for the average retail investor. We can, and should, find better ways to provide compensation to injured investors. For example, in addition to implementing binding recommendations by OBSI, or enabling the expanded use of disgorgement orders, another consideration might be to create an industry-sponsored fund to improve access to compensation, particularly for less affluent investors.

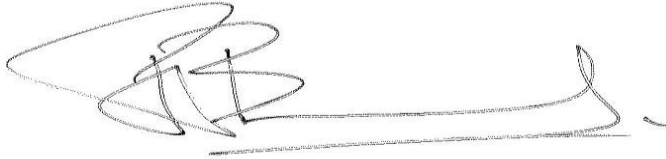
Goal 4 – Strengthen Our Organizational Foundation

4.2 Modernize OSC Technology Platform

We recommend that the OSC's integrated digital strategy also include enhancing data collection and analysis of investor complaints from different sources, including databases managed by the OSC's complaint centre, other CSA members, and the SROs. This should enhance the Commission's ability to identify objectionable patterns of alleged misconduct, and its ability to focus resources to take corrective action before more investors are harmed.

FAIR Canada thanks you for the opportunity to provide our comments and views on the OSC's priorities for the coming year. Please be advised that we intend to make our comments public by posting them on the FAIR Canada website. I would be pleased to discuss our comments should you have questions or require further explanation of our views on these matters. Please contact me at JP.Bureaud@FAIRCanada.ca. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'JP Bureaud', with a horizontal line underneath.

Jean-Paul Bureaud
Executive Director
FAIR Canada