

INVESTOR ADVISORY PANEL

September 18, 2023

Government of Ontario – Ministry of Finance
ontariocanada.com/registry/

Re: Proposed regulation that prescribes additional purposes for which the Ontario Securities Commission can use enforcement money

On behalf of the Investor Advisory Panel (the “Panel”), I wish to thank you for this opportunity to comment on the Ministry of Finance’s proposal to authorize new uses of enforcement money in the Ontario Securities Commission’s (“OSC”) Designated Fund.

The Panel’s mandate

The Panel is an initiative of the OSC to ensure investor concerns and voices are represented in the OSC’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.

The proposed regulation

Currently, the Securities Commission Act (“SCA”) authorizes the OSC to allocate enforcement money: to or for the benefit of third parties; for use by the OSC or third parties to educate investors or promote knowledge of securities and financial markets; or for any other purpose specified in the regulations.

Ontario’s proposed new regulation would prescribe two additional purposes for which enforcement money could be used:

1. To enhance the OSC’s capabilities in information technology, data acquisition and data analytics in order to address regulatory matters relating to investor protection, the reduction of systemic risk or the integrity of the capital markets.
2. To fund activities of the OSC’s Office of Economic Growth and Innovation aimed at fostering innovation, capital formation and competition in Ontario’s capital markets.

Ontario’s [proposal document](#) states that the OSC’s existing practice of prioritizing distributions to harmed investors would continue under the new regulation. It notes that the OSC would develop internal controls — such as a Board-approved implementation plan and budget for eligible expenditures — to ensure that funds are appropriately used. It also states that approved expenditures would be limited to enforcement money on hand and periodically earmarked by the Board, so as to ensure the OSC does not become operationally dependent on the receipt of future enforcement money.

The Panel’s position and recommendations

On balance, the Panel is supportive of the proposed regulation. However, we have a number of concerns that we outline below before proposing specific recommendations to mitigate these concerns.

The current size of the Fund is reflective of the extent of investor harm throughout the years. The fact that that harm cannot be directly attributed to individual investors in many cases should not mean that the Fund should be used for purposes not related to investors. Linking expenditures from the Fund with investor-focused initiatives should be paramount.

The proposed regulation would authorize the funding of expenditures not related to the Fund's fundamental purpose of benefiting investors.

The Panel believes the proposed regulation, as written, would put the OSC in a conflicted position. The types of expenditures permitted under the proposed regulation are so broad that the OSC could fund a vast array of its own administrative expenditures from the Designated Fund. This could potentially create the perception that the OSC has an incentive to conduct enforcement actions for improper purposes — namely, to finance its own operations.

The Panel believes the above concerns could be addressed by making the following changes:

1. Limit Fund expenditures to investor-related matters

To better support investors, we recommend that the proposed regulation be amended so that the OSC can only use enforcement money to fund “information technology, data acquisition and data analytics” capabilities that directly benefit investors. The regulation should make explicit that the Designated Fund cannot be used by the OSC for general purposes.

We would also like to see the Fund used to help with the OSC's enforcement-related collections process by specifically permitting payments out of the Designated Fund to fund additional staff directly involved in the OSC's collection activities, and to pay legal and other fees directly associated with collection efforts.

2. Enhance internal controls

We support a requirement for the Board to establish internal controls to govern system enhancement expenditures. We recommend that this requirement include a reporting requirement that mandates the OSC to be publicly transparent about how funds are used and how the expenditures would benefit investors.

We similarly support a requirement for internal controls for expenditures related to the Office of Economic Growth and Innovation. However, we recommend that the controls include an investor protection lens. We note that the OSC TestLab 2022 Report included a number of solutions that would directly benefit investors. We would like to see this as a focus of the Office and that support for this type of work continues.

3. Prioritize other allocations

We would urge other allocations from the Designated Fund be prioritized before expenditures are made under a new regulation. Specifically, we advocate for: increased allocations to the OSC's whistleblower program; for continuing material allocations to FAIR Canada, Prosper Canada, and

investor protection clinics, such as the one established at Osgoode Hall Law School; and for increased funding of the Investor Office.

4. Pass further amendments

We recommend that the SCA be amended to: enable the Capital Markets Tribunal to order restitution in appropriate circumstances; and to increase the maximum fine that can be awarded for administrative monetary penalties to \$5 million and for offences to \$10 million.

We thank you again for the opportunity to comment on this proposed regulation. We would be happy to clarify or elaborate on our comments should the need arise.

Again, thank you for providing us with the opportunity to participate in this consultation.

Regards,

A handwritten signature in black ink, appearing to read 'Ilana Singer', with a stylized, cursive script.

Ilana Singer
Chair, Investor Advisory Panel