FAIR Canada Canada's Investor Rights Advocate | Promoteur des droits des investisseurs

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Re: OSC Notice 11-797 – Request for Comments Regarding Statement of Priorities for Financial Year to End March 31, 2024

FAIR Canada is pleased to provide comments to the Ontario Securities Commission (OSC) in response to the above-referenced consultation.

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. We advance our mission through outreach and education, public policy submissions to governments and regulators, and proactive identification of emerging issues. FAIR Canada has a reputation for independence, thoughtful public policy commentary, and repeatedly advancing the interests of retail investors and financial consumers.[1]

A. General Comments

FAIR Canada appreciates the statement that delivering strong investor protection remains a top priority in all OSC initiatives and actions. However, we are concerned that the Statement of Priorities (SoP) falls short in realizing this objective by failing to specify the actions the OSC plans to take to foster investor protection. For example, several investor-focused initiatives, such as investor education and the use of behavioural research to improve investor outcomes, are carried over from previous Statements of Priorities. This makes it difficult to distinguish between "business as usual" work and the priorities for 2023-24.

Based on the adage "what gets measured, gets done," this lack of specificity risks resulting in few meaningful advancements or improvements to protect investors.

We are also concerned that the SoP appears overweighted with priorities that do not have investor protection at their core. Of the nineteen priorities, only three appear under the heading "Strengthening Investor Safeguards." This could suggest the OSC is prioritizing other aspects of its mandate at the expense of addressing investor protection issues.

[1] Visit www.faircanada.ca for more information.

This concern is amplified by the recent expansion of the OSC's mandate, coupled with the OSC's ongoing focus on reducing regulatory burden for the industry. This raises legitimate concerns among investor advocates that existing OSC resources are being strained to the detriment of investor protection projects.

This issue was also thoroughly discussed last December in the Auditor General of Ontario's Value-for-Money Audit of the OSC (the Value-for-Money report). After an extensive review and consultations with stakeholders, the Auditor General concluded that rules designed to protect investors take too long to implement.[2] Her report found that projects that involved investor protection took on average 3.9 years to complete compared with two years for projects that did not include an investor protection component.[3]

The SoP does not provide much reassurance this situation will change in a meaningful way. We therefore encourage the OSC to dedicate the necessary resources to deliver on all investor protection initiatives in a timely manner.

We also encourage the OSC to consider adopting a more data-driven, outcome-based approach to its priorities. A good example of this approach is from the Financial Conduct Authority (FCA) in the UK. The FCA's 2022/23 Business Plan[4] is accompanied by an outcomes and metrics publication that sets out specific metrics it uses to evaluate whether it achieved its strategic objectives.[5] For example:

> *Outcome:* Consumers get products and services which are fair value.
>
> *Metric:* Reduction over time in upheld Financial Ombudsman Service complaints about charges, fees and commission and premium pricing.
>
> *Outcome:* The redress system delivers timely and fair complaint resolution and compensation to consumers.
>
> *Metric:* Increase in the overall timeliness of firms' complaint resolution measured by the proportion of complaints closed within 3 days, between 3 days and 8 weeks, and after 8 weeks.

The FCA's more specific approach provides greater transparency and public accountability in setting and delivering on its strategic priorities.

Given that the fees the OSC collects from market participants are ultimately passed on to investors, they deserve to have clarity about how their money is being used to protect their rights and interests. This clarity would also strengthen public confidence that the OSC is indeed striking the appropriate balance between investor protection and other aspects of its expanded mandate.

B. The SoP is Missing Several Critical Investor Protection Issues

In addition to our general comments, several critical investor protection issues are missing from the draft SoP. These need to be addressed in the final SoP adopted by the OSC.

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[2] Office of the Auditor General of Ontario, Value-for-Money Audit of the OSC, December 2021 at p. 19 – 20.
[3] Ibid.
[4] FCA Business Plan 2022/23, April 7, 2022.
[5] FCA Outcomes and Metrics, April 7, 2022.

1. Client Facing Titles and Proficiencies

The Canadian Securities Administrators' (CSA) 2022 – 2025 Business Plan includes reviewing title and proficiency requirements. In particular, the CSA committed to continuing to work to better align the interests of registrants and their clients by reviewing registrant requirements such as client-facing titles, proficiency, and designations. We are disappointed that the SoP, in contrast, is silent on these important investor protection matters.

While the client-focused reforms (CFRs) and the accompanying compliance sweeps may help to enhance investor protection in some of these areas, we are concerned the new title protection framework[6] in Ontario will create further investor confusion and lead to investor harm.

One of the challenges stemming from the framework is that it protects the "financial advisor" title, for which there is no common understanding or accepted definition. Stated simply, no one really knows what a "financial advisor" is or does. Moreover, there is an ongoing debate about what proficiencies and competencies a person should have before they can hold themselves out to the public as a "financial advisor."

This issue should be a cause of concern since, as currently implemented, anyone registered under securities law as a mutual fund dealing representative could begin calling themselves a "financial advisor" without significantly upgrading their proficiencies or competencies.

This is problematic since a reasonable investor would expect a "financial advisor" to be able to provide comprehensive financial advice, as opposed to advice focused only on buying mutual funds. The result is a significant gap between the investor's reasonable expectation and what the regulatory regime permits. Numerous investor advocates have expressed concerns that this gap represents a step backwards and will inevitably lead to poor outcomes and investor harm if not addressed.

For this reason, we are surprised that the SoP does not include any reference to how the OSC intends to address this issue from the perspective of its mandate to protect investors.

Related to titles is the issue of proficiencies. We believe the SoP should also include proposed actions and outcomes for reviewing and enhancing registrant proficiency standards.

We understand that the OSC and other CSA members last reviewed proficiency requirements more than ten years ago. A lot has happened since. For example, crypto assets have become mainstream and we've seen an increase in investments based on environmental, social and governance (ESG) factors. The numerous changes in products, asset classes and markets raise the question: are registered representatives sufficiently trained to provide advice in this new context? Our concern is that course requirements have not kept pace to ensure registrants are competent and able to provide investors with reliable advice.

We also note that over the past two years, the Investment Industry Regulatory Organization of Canada has developed and published competency profiles for its approved person categories to enhance confidence in

[6] Financial Services Regulatory Authority of Ontario, Financial Planners and Financial Advisors.

its proficiency regime. We would expect the OSC (and CSA) to undertake similar work for the registrants it supervises directly, namely exempt market dealers and advisers.

We encourage the OSC to prioritize working with the government, the CSA, and the Financial Services Regulatory Authority of Ontario in 2023 - 2024 to review title and proficiency requirements to ensure they deliver stronger investor protections.

2. Auditor General of Ontario Report

The SoP fails to mention the Value-for-Money report and in doing so, the OSC misses the opportunity to provide stakeholders with important information about how it plans to implement the report's outstanding recommendations. The SoP should provide further details about how the OSC intends to address those recommendations that relate to investor protection.

For example, one recommendation is that the OSC develop and implement a formal plan with a specific timeline and budget to integrate the applications, data and processes used to record and manage investor complaints. In the Value-for-Money report, the OSC indicates that it will develop the plan. The SoP should detail the OSC's timelines for developing and executing the plan.

3. Problematic Promotional Activity and Gamification

The rise in do-it-yourself trading platforms and the reliance on social media applications as a source of investment information are raising significant investor protection concerns. These include undisclosed promotional activity on social media and gamification techniques designed to encourage poor investment decisions.

Recently, the British Columbia Securities Commission (BCSC) proposed new disclosure requirements related to promotional activity on social media and other sources. The BCSC rule would require a person or company that conducts promotional activity for an issuer to disclose certain information at the time of the activity, including the name of and amount of compensation provided to the person retained to conduct the promotional activity.[7] The BCSC noted that the proposed requirements are intended to provide investors with greater transparency about the source and reliability of promotional activity, enabling them to make more informed investment decisions. The OSC should consider adopting similar requirements to better protect investors in Ontario.

We also recommend that the OSC prioritize regulatory responses to address concerns regarding gamification. These include design features in online trading platforms that unfairly influence investors to engage in trading behaviour detrimental to their interests.

C. Goal 1: Building Trust and Fairness in Ontario's Capital Markets

1. Advance Work on ESG Disclosures for Reporting Issuers

[7] BCSC Proposed British Columbia Instrument 51-519 - Promotional Activity Disclosure Requirements, May 26, 2021.

We welcome the OSC's commitment to completing a focused review of ESG disclosures by investment funds and publishing a summary of findings and any guidance updates by December 2023. We also appreciate the OSC's efforts to advance the international development of uniform ESG disclosure standards and urge that this remains a priority.

Pending development of international standards, however, we encourage the OSC to continue to prioritize compliance and enforcement action against those issuers that engage in "greenwashing" contrary to existing disclosure standards and requirements. Investors should not have to wait to be protected from market participants that engage in greenwashing today.

2. Enhance Fee Transparency

We are pleased to see that the OSC will publish final amendments to implement total cost reporting (TCR) disclosures by April 2023.

FAIR Canada supports TCR and, like other investor protection focused rules identified in the Value-for-Money report, it is long overdue. Consumers should be able to see and understand all the fees and costs associated with buying an investment product. In implementing TCR, the focus should remain on ensuring that the information is provided in plain language and presented in a way that the average investor will understand.

3. The New Single Enhanced Self-Regulatory Organization (SRO)

We appreciate the recognition in the SoP that the new SRO has critical public interest responsibilities.

In line with this important responsibility, it should be an OSC priority to ensure that key investor protection elements of the new SRO are being appropriately established from the outset. Furthermore, it will be important to ensure the new SRO's focus on investor protection is not adversely impacted during the amalgamation process, or when the subsequent work to combine different rules, registration processes and enforcement approaches is undertaken in the coming years. In short, the OSC should prioritize effective oversight of the new SRO to ensure it remains focused on its public interest mandate.

D. Goal 2: Strengthening Investor Safeguards

1. Expand the Focus on Retail Investors Through Specific Education, Policy, Research and Behavioural Science Activities

We are pleased the OSC is expanding its focus on retail investors. However, as noted in our general comments, it is difficult to distinguish the priorities for next year from the OSC's ongoing work. We are concerned that this section lacks specificity and clear deliverables.

The OSC should continue to focus on understanding the concerns and needs of retail investors through focus groups and other research techniques. This would help to better understand how retail investors interact with the capital markets, which could help develop rules that better protect investors.

We therefore support the commitment to conduct and publish timely and responsive investor research. The SoP, however, does not include any details regarding research topics or timelines. It would be helpful if the SoP outlined which research projects the OSC is prioritizing in the coming year. For example, the OSC's recent report on gamification concluded that regulators should gather more data by conducting further research on simulated investing platforms.[8]

In addition to gamification, we believe the OSC should prioritize behavioural research to better understand how investors interact with and understand investor-facing disclosure (e.g., Form 54-101F1 - Explanation to Clients and Client Response Form).[9] Insights gained from this research could improve existing forms and disclosure so average retail investors can better understand them.

2. Strengthen Investor Redress and OBSI

We welcome the announcement that the CSA is developing a proposal for comment, sometime in 2023, that "contemplates" providing the Ombudsman for Banking Services and Investments (OBSI) with the authority to make awards that are binding on firms.

Suffice it to say, we are well past the time for "contemplating" providing OBSI with binding authority. For many years, the OSC has repeatedly announced that "strengthening OBSI" is among its top priorities. The lack of binding authority was also identified as a critical gap in our investor protection framework more than ten years ago.

As such, we remain concerned with the seeming lack of urgency when it comes to strengthening the complaint handling system for investors. However, we look forward to reviewing the particulars of how the CSA intends to enable binding recommendations, including clear timelines for when it will be implemented.

Beyond binding authority, we also encourage the OSC to look at other ways to better protect investors when they bring a complaint to OBSI. This would include, for example, reducing the period from the current 90 days to 60 days for when firms must respond to their clients. This would be consistent with recent developments in Canada and be better aligned with international best practices. For example, some jurisdictions require firms to provide their final response within 45 days.

The OSC should also prioritize an appropriate regulatory response when firms engage in low-ball offers or outright refusal of OBSI recommendations. The more prevalent practice of offering low-ball settlements calls into question the firm's duty to act fairly, honestly and in good faith; it is a serious regulatory issue and needs to be treated as such.

Further, the OSC should prioritize a review of the Systemic Issues Protocol (the Protocol) it has with OBSI.[10] Currently, the Protocol limits OBSI's ability to identify systemic issues and report them to regulators. There

[8] OSC Staff Notice 11-796 - Digital Engagement Practices in Retail Investing: Gamification and Other Behavioural Techniques, November 17, 2022 at p. 48.
[9] FAIR Canada's comment letter to the OSC on CSA Notice and Request for Comment – Proposed Amendments and Proposed Changes to Implement an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers details our concerns and recommendations regarding Form 54-101F1.
[10] Protocol for Handling Systemic Issues - OBSI and OBSI Joint Regulators Committee.

have been repeated reviews that have called for strengthening OBSI's ability to address systemic issues. The most recent review by Professor Poonam Puri discussed these issues in detail, including how the Protocol should be improved. We believe the OSC should prioritize its review of the Protocol and develop proposed revisions by the end of 2023.

3. Monitor the Ban on Deferred Sales Charges (DSC) and Trailing Commissions

We fully support the OSC's review of industry practices involving the use of dealer chargebacks and its commitment to develop any necessary regulatory responses.

FAIR Canada recently recommended banning advisor chargebacks for segregated funds contract sales.[11] Like DSCs, chargebacks create a potential conflict between the interests of the dealer and the client, which could lead to poor customer outcomes.

In addition to chargebacks, we encourage the OSC to examine other compensation structures that may distort the advice process.

E. Goal 3: Adapting Regulation to Align with Innovation and Evolving Markets

1. Strengthen Oversight and Enforcement in the Crypto Asset Sector

We support the OSC's emphasis on strengthening oversight and enforcement in the crypto asset sector. We applaud the OSC's proactive response to protect investors in Ontario by requiring firms to sign an undertaking pending their registration. The OSC's response to protect investors from FTX also deserves to be recognized for what it was – a proactive response to protect investors.[12] The OSC's actions limited FTX's access to the Canadian market, which helped Canadian investors escape the worst of the fallout from FTX's collapse.

FAIR Canada is pleased to see a commitment in the SoP to further develop technology tools and specialized skills in crypto asset trading platform oversight. It is not clear, however, whether the OSC intends to acquire more human resources to assist with this burgeoning area. In contrast, we note that the Securities and Exchange Commission (SEC) announced in May 2022 that it was adding 20 staff to its Crypto Assets and Cyber Unit in its Division of Enforcement.[13] Given that retail investors bear the brunt of abuses in the crypto space, we believe the OSC should pursue additional resources to bolster investor protection in this high-risk area.

2. Streamline Periodic Disclosure Requirements for Corporate Finance and Investment Fund Reporting Issuers

[11] FAIR Canada comment letter to the Canadian Council of Insurance Regulators Secretariat, Discussion Paper on Upfront Compensation in Segregated Funds, November 7, 2022.
[12] Financial Post, How Regulation Slowed FTX's Growth, Limiting the Toll of its Collapse in Canada, November 16, 2022.
[13] SEC Press Release, SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit, May 3, 2022.

Streamlining regulation and reducing regulatory burden is a core theme that runs throughout the SoP. The SoP states that the OSC will streamline filings by corporate finance and investment fund reporting issuers to reduce regulatory burden on issuers, and "modernize" the way documents are "delivered" to investors by implementing an access equals delivery (AED) model for certain disclosure documents.

While we support efforts to modernize disclosure, AED tilts the balance too much in favour of removing costs at the expense of providing better investor choices and promoting engagement. In our view, AED is more about removing what amounts to nuisance costs for issuers than proposing modern solutions to enhance ways investors can receive the information they are entitled to receive.

We encourage the OSC to prioritize finding solutions to facilitate the use of electronic delivery of documents by email, as well other ways to promote easier investor access to reporting issuer information. In this regard, we note that Congress may consider a bill that would direct the SEC to make electronic delivery the default in the U.S.[14]

The OSC should also explore other digitization solutions on a priority basis, such as mandating that a QR code be included on fund facts documents that would take the investor directly to the fund's designated website. It could also explore how digitized communications could enhance investor experience and engagement by creating a more inviting, user-friendly, and efficient reading experience.

3. Complete Transition to SEDAR+

We support efforts to modernize the national database systems through the SEDAR+ projects. We understand, however, that the primary focus to date has been on how to streamline and facilitate the protocols filers must follow when entering data into the system. Again, this reflects the OSC's commitment to reducing regulatory burden for the industry.

Little attention, if any, appears to have been given to improving the system from the perspective of retail investors. We are not aware of the CSA approaching any investor group to ascertain how the system could be improved to facilitate investor preferences for how they want to access and receive information about reporting issuers.

Given that we appear to be moving to an AED model, we believe that SEDAR+ needs to be revisited to ensure it meets the needs of investors. This could include, for example, building in the functionality to enable investors to pre-select which filings they wish to receive and how they want to be notified when such filings are available. This could include a subscription feature, which would email the pre-selected documents for different reporting issuers, or it could include an alert feature to notify the investor the document is available.

If the OSC adopts AED as proposed, it will be incumbent on the OSC to prioritize further enhancements to SEDAR to be better serve investors. The current system, particularly when it comes to investment funds, falls short.

[14] A Bill to direct the SEC to promulgate rules with respect to the electronic delivery of certain required disclosures.

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Thank you for considering our comments on this important issue. We welcome any opportunities to discuss the SoP and advance efforts to improve outcomes for Ontario investors. We intend to post our submission on the FAIR Canada website and have no concerns with the OSC publishing it on its website. We would be pleased to discuss our submission with you. Please contact Jean-Paul Bureaud, Executive Director, at jp.buread@faircanada.ca or Tasmin Waley, Policy Counsel, at tasmin.waley@faircanada.ca.

Sincerely,

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FAIR Canada | Canadian Foundation for Advancement of Investor Rights