

May 29, 2012

OSC Investor Advisory Panel
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Dear Mr. Day,

Re: Draft Statement of Priorities 2012-2013

1. Introduction

The Investor Advisory Panel (“IAP” or “Panel”) is an independent body that was appointed by the Ontario Securities Commission in August 2010. Our mandate is to represent the views of investors and to provide input on the Commission’s policy initiatives, including proposed rules and policies, the annual Statement of Priorities, concept papers and other issues. The present submission outlines our views on the Commission’s 2012-2013 draft Statement of Priorities (“SOP”).¹

We would like to express general support for the Commission’s SOP for the upcoming year, which in our view marks an improvement from the 2011-2012 draft of this document. We were encouraged by the Commission’s response to our input last year, which we believe resulted in an improved final version, and we appreciate the opportunity to comment on the present draft.

We support the Commission’s move towards the identification of more specific priorities. Regulatory accountability requires clarity and transparency. The Statement of Priorities is a legislatively mandated document. It is a central method of communication between the Commission and its stakeholders and an important mechanism for regulatory accountability under the *Securities Act*.² The priorities and initiatives enumerated in the SOP should be as clearly and precisely stated as possible.

¹ We extend our deep appreciation to Chava Schwebel, J.D. student at the Faculty of Law, University of Toronto, for her valuable assistance in the research and preparation of this submission.

² *Securities Act* (Ontario) R.S.O. 1990, Chapter S.5 (“OSA”).

2. Overview

Our submission is divided into two broad parts. The first part deals with regulatory accountability and the second with recommendations relating to substantive securities law.

Regulatory Accountability:

- Further information should be provided about the time frame, performance criteria, and substantive policy and research commitments identified in the SOP to provide a framework for the achievement of the stated objectives. While the Commission’s annual report of its progress against each year’s SOP is beneficial in this regard, this report would be more effective if measurable and consistent criteria were adopted to evaluate the Commission’s performance.³
- A “score-carding” or other internal performance measurement system should be developed to track the Commission’s progress in executing all of its operational, research, and policy goals, the results of which should be published on the Commission’s website.
- A regular, independent review of Ontario securities regulation should be conducted, as required by statute,⁴ and,
- The Commission should provide greater clarity regarding the governance and structure of the Office of the Investor (“OTI”).

Substantive Law:

Our recommendations relating to substantive securities law are divided into three categories: 1) the investment decision; 2) securityholders’ rights; and 3) securityholders’ remedies. Broadly speaking, we call for:

- 1) Investment Decision: Fiduciary duties for investment advisers; financial products disclosure; and reform of the exempt market;
- 2) Securityholders’ Rights: Specific timelines and expectations regarding shareholder democracy initiatives; and,
- 3) Securityholders’ Remedies: Restitution for investors; limitation periods for shareholder class actions; and, measures to support independent dispute resolution services for consumer financial complaints in Ontario and across Canada.

Our recommendations reflect our mandate to represent the views of investors in the policy making process. They are the result of our deliberations as a Panel as well as outreach and consultation. In particular, we conducted four retail investor focus groups in 2011; we had discussions with individuals from Canada, the U.S. and the U.K.; we received written submissions; and, we consulted with additional individuals during meetings this past April and

³ See e.g., OSC, “Report on the Statement of Priorities for Fiscal 2010 – 2011” (2011).

⁴ S. 143.12 *OSA*, *supra* note 2.

May.⁵ Together with the IEF, we are now planning a citizen’s engagement study. A list of individuals with whom we consulted or from whom we received feedback is contained in Appendix A.

3. Recommendations

The draft SOP identifies five regulatory goals: to deliver responsive regulation; to maintain effective enforcement and compliance; to ensure strong investor protection; to improve operational efficiency of the Commission; and, to become more engaged in the assessment and management of “systemic risks” in partnership with other regulatory agencies.

We generally agree with these objectives but believe that the development and publication of targeted performance criteria (e.g., benchmarks, time frames, and deliverables) for specific initiatives should be provided to enable stakeholders to recognize and evaluate the Commission’s efforts to fulfill its defined objectives. On a substantive level, we also have concerns that certain issues have been either overlooked or could go further to protect consumer interests.

3.1 Regulatory Accountability

a. Performance Reporting

We support the development of a comprehensive and transparent system to track the Commission’s progress towards meeting its policy objectives and would like to see greater efforts to do so in the SOP.⁶ The current document lacks details regarding the Commission’s prospective efforts to work towards its objectives: what are the timelines for the achievement of the objectives? Will progress be publicly reported periodically? Will a tracking system be introduced?

We recognize that the precise scope and format of performance reporting is within the Commission’s discretion. The method adopted by the U.K. Financial Services Authority (“FSA”) offers a useful, albeit complex, model.⁷ The FSA uses an Outcomes Performance Report to measure its progress against three strategic aims, each involving a number of outcomes and sub-outcomes which are tracked according to over 100 metrics, each with a different timescale.⁸

⁵ For details of the methodology and data derived from our focus groups see: Brondesbury Group, “Retail Investor Focus Group Report – Investor Advisory Panel”, Appendix A, Re: SOP 2011-2012 *infra*, note 27 (“Brondesbury Report”). We also draw in this submission on responses to a formal request for public input published on our website and Facebook page, responses to which are available online at: <http://www.osc.gov.on.ca/en/35820.htm>. In addition, we organized webinar in order to gather investor input, although this initiative was hampered by technological difficulties. The deliberations of the previous Investor Advisory Committee (“IAC”) were also informative in the preparation of this submission, see: Investor Advisory Committee (“IAC”), “2006 Report” (Draft 1, prepared by Caroline Cakebread for the OSC, Feb. 2007) at 13 (“IAC Report”); IAC, “Why did the OSC need an Investment Advisory Committee” (undated, current as of May 14, 2012); and, IAC, “The Advisor- Client Relationship: Recommendations for Reform” (October 2007) (“IAC, Recommendations”) (collectively on file with IAP).

⁶ OSC, “Notice 11-766 – Statement of Priorities – Request for Comment Regarding Statement of Priorities for Financial Year to End March 31, 2013” (March 30, 2012) at 6 (“Draft SOP”).

⁷ For more information, see Financial Services Authority, “Outcomes Performance Report” (undated), online: <http://www.fsa.gov.uk/pages/about/aims/performance/opr/index.shtml>.

⁸ *Ibid.*

According to the FSA, this reporting system helps the agency “monitor regulatory outcomes, risks, effectiveness, efficiency and economy,” and be more “outcomes-focused.”⁹ This is one example of a disciplined and empirical approach to tracking regulatory progress and policy development, the introduction and disclosure of which would benefit Ontario investors.

Other accountability measures should also be considered. For example, the Commission could publish its meeting agendas and minutes, as well as the results of any internal studies and consultations.¹⁰ It could solicit public input on its performance against strategic initiatives such as those outlined in the SOP, and other issues that stakeholders may raise with the Commission. Along the lines of its recent Strategic Plan, the Commission may also want to consider the engagement of an external consultant to assist with specific initiatives, such as the development of an internal performance reporting system, or performance reviews of internal Offices or Branches.¹¹

Finally, we note that the Commission plans to “expand its research and data analysis capabilities” with a dedicated research and analysis group to support policy development.¹² We support greater use of empirical data to support policy initiatives. Details of this initiative would also be helpful, for example regarding how this research group will operate, whom it will report to, how its progress will be evaluated, and to what extent prospective outreach and research initiatives will be funded.

b. Review of Ontario Securities Legislation

Section 143.12 of the *Securities Act* mandates the appointment by the Minister of Finance of an advisory committee every four years to review Ontario securities law.¹³ The last such committee (sometimes referred to as the “Five Year Review Committee”) was struck in 2000. It published an interim report for comment and delivered its final report to the Ontario Legislature in March 2003 after extensive research and public consultation.¹⁴ Beyond the fact that it is an explicit legal requirement, we believe that a regular review of securities legislation by an independent committee would benefit investors and, indeed, all stakeholders.¹⁵ The Commission should commit to asking the Minister to appoint a review committee this year, and be pro-active in its efforts to ensure that this legislative requirement is respected.

⁹ *Ibid.*

¹⁰ This recommendation derives from John Leston’s report, “Transparency as a Regulatory Tool”, presented to the FSA’s Financial Services Consumer Panel (Sept., 2010) at 6, online: http://www.fs-cp.org.uk/publications/pdf/fscp_transparency.pdf.

¹¹ Such as the Navigator Report recently commissioned by the Ombudsman for Banking Services and Investments (“OBSI”): Phil Houry, “2011 Independent Review of the Ombudsman for Banking Services and Investments,” The Navigator Company (2011) (“Navigator Report”); see also OSC, “2012-2015 Strategic Plan: The OSC, A 21st Century Securities Regulator,” (Feb. 27, 2012) (“Strategic Plan”).

¹² Draft SOP, *supra* note 6 at 6.

¹³ *OSA*, *supra* note 2 s. 143.12.

¹⁴ See Five Year Review Committee, “Final Report – Reviewing the Securities Act (Ontario)” (March 21, 2003). In 2008-2009, the OSC was also “the subject of an agency review by the provincial Standing Committee on Government Agencies”: OSC website, http://www.osc.gov.on.ca/en/About_organization_index.htm.

¹⁵ I.e., as this process involves extensive public consultation, which we anticipate would generate useful research and recommendations regarding securities law and the Commission’s policies.

c. The Office of the Investor

The proposed creation of an Office of the Investor (“OTI”) holds potential for representation of investor interests in the policy-making process. We see the establishment of this Office, like the appointment of the IAP, as an attempt to ensure that investors’ interests are adequately represented.¹⁶ However, we ask that the Commission provide more explicit information about the proposed governance of this Office. A number of individuals with whom we consulted raised questions about the structure and operation of the OTI, as well as the role of the IAP and the extent of the IAP’s independence in relation to it.¹⁷ The OTI is a key opportunity for the Commission to address the imbalance between industry and retail investor representation in the policy development process. We support its establishment and ask that more information about it be made public.

3.2 Recommendations Regarding Substantive Law

3.2.1 Investment Decision

a. Fiduciary Duty

In its 2011-2012 Statement of Priorities, the Commission stated that it is committed to researching the “pros and cons” of imposing a statutory fiduciary obligation on financial dealers and advisers.¹⁸ This year, the Commission undertakes to finish its research, prepare and publish a paper on this issue in consultation with the Canadian Securities Administrators (“CSA”), and, ultimately, “consider whether an explicit statutory fiduciary duty or other standards should apply to all advisers and dealers in Ontario.”¹⁹ While we recognize that the Commission is considering this important issue, it seems that little overt progress has been made in the past year towards publishing background research and receiving comments regarding introduction of a fiduciary duty, let alone indicating whether this is a policy option that the Commission supports.²⁰

We note that discussion of the legal relationship between investors and their advisers is not new: academics, investor organizations, research and advisory bodies, journalists, and other stakeholders have examined the issue of a fiduciary standard for at least the better part of a decade.²¹ For example, FAIR Canada writes that, “[t]here is a misalignment of investor

¹⁶ As Pamela Reeve, former member of the OSC’s Investor Advisory Committee, stated: “[a]part from the IAP itself and FAIR Canada [...] there is a lack of organizational infrastructure and resources to support effective interest representation on retail investor issues.” Pamela J. Reeve, Ph.D., “Submission re: IAP’s Request for Input” (May 9, 2012) at 5 (“Reeve Submission”).

¹⁷ This issue was discussed during our March 8, 2012 Roundtable (“Roundtable”), as well as our meeting with representatives of the Canadian Foundation for Advancement of Investor Rights (“FAIR Canada”) on April 11, 2012. Minutes from these meetings are available online: http://www.osc.gov.on.ca/en/Investors_iap_meeting-agenda-minutes_index.htm. See also Appendix A, *infra*.

¹⁸ OSC, “Statement of Priorities for Fiscal 2011-2012” (2011) at 7 (“2011-2012 SOP”).

¹⁹ Draft SOP, *supra* note 6 at 5.

²⁰ This issue has been on the table in Ontario for far too long without resolution: see Reeve Submission, *supra* note 16 at 2; see also IAC Report, *supra* note 5 at 13 and IAC Recommendations, *supra* note 5.

²¹ See, e.g.: IAC Report, *ibid* at 12-13; Financial Planning Standards Council (“FPSC”), “Submission to the Investor Advisory Panel” (January 2011) at 2-4; Small Investor Protection Association (“SIPA”), “Re: Request for Comments – Consultation Paper December 20, 2010 Consultation on Possible Options for the Incorporation of Individual Representatives of Registered Dealers and Advisers in Canada” (Feb. 18, 2010); Kenmar Associates, “Re: CSA Notice and Request for Comments – Accredited Investor Exemption” (Feb. 26, 2012); Boyd Erman, “A

expectations and advisors' actual duties under the current rules [...] [and] there is an extreme informational asymmetry between investors in Canada and their financial advisors, which needs to be addressed by imposing a higher onus on advisors."²² Throughout this time period, and despite calls from various stakeholders to address the issue of fiduciary duty, the Commission has for the most part remained silent.

Existing requirements to "Know Your Client" and "Know Your Product" which require the completion of boilerplate account information forms and adherence to notional proficiency standards do not protect investors from fraudulent, negligent or abusive sales practices. In particular, these standards do not prevent or require disclosure of conflicts of interests, such as clear disclosure of commissions and other benefits earned by the sale of an investment product, and how other, more suitable products may compare.²³ And, while they aim to do so in concept, these standards do not necessarily ensure that advisers adequately inform themselves as to the risks of an investment, trading strategy or finance decision. They do not ensure that advisers' initial recommendations are and continue to be actually appropriate to their clients' needs and financial situation.²⁴ Indeed, research shows that investors would be better protected if an explicit fiduciary obligation were in place.²⁵

We ask that the Commission lay out a specific timeline or framework for: the completion of its research; the publication of a concept paper, which includes a discussion of international developments and comprehensive benchmarking against other major regimes; and its decision-making regarding whether a statutory fiduciary duty will be introduced in Ontario. The consultation process should provide for an iterative dialogue with the IAP, the CSA and other stakeholders. These initiatives should be well underway by this time next year: regulators in

to-do list for the OSC's Howard Wetston" *The Globe and Mail* (Dec. 19, 2011); Ed Waitzer, "Make advisors work for investors" *The Financial Post* (Feb. 15, 2011); and, Barrie McKenna, "The flaws in Canada's financial adviser system" *The Globe and Mail* (Feb. 17, 2012). In 2010, FAIR Canada and the Hennick Centre for Business and Law organized a conference on this issue, the results of which are summarized online: FAIR Canada/Hennick Centre Conference, "The Fiduciary Standard and Beyond" (March 26, 2010), online: <http://faircanada.ca/top-news/putting-clients-best-interests-first/>. See also, FAIR Canada, "Re: The Investor Advisory Panel Seeks Your Input" (May 18, 2012) ("FAIR Response") at 2.

²² FAIR Response, *ibid* at 2; see also Brondesbury Report, *supra* note 5, which FAIR cites in its submission.

²³ Under existing "KYC" rules, "suitability" is largely a negative requirement. Advisers are barred from recommending an "unsuitable" product; they need not recommend the most suitable one, i.e., the product most consistent with their clients' best interests.

²⁴ See e.g.: Chant *infra*, note 32 for discussion of the role of inadequate comprehension and due diligence by the investment industry in relation to the sale of non-bank ABCP to retail investors under the short-term debt exemption prior to the collapse of this market in 2007; and, OSC Staff Notice 33-735 regarding widespread abuse of the accredited investor exemption to sell exempt securities to unqualified investors: OSC, "Staff Notice 33-735 – Sale of Exempt Securities to Non-Accredited Investors" (May 13, 2011) ("Staff Notice 33-735"). The adequacy of adviser training and certification requirements was also raised during our consultations. Diane Urquhart commented that: "Financial advisors working for the investment dealers owned by the major Canadian banks [...] are under-educated and inadequately trained for the role, as they are only required to pass the Canadian Securities Course/Investment Funds in Canada Course and Registered Representative Licensing Exam." Diane Urquhart, "Answers to May 7, 2012 OSC Investor Advisory Panel Questions," email to the IAP Chair (May 8, 2012) at 2 ("Urquhart Comments") (on file with IAP). With CSI Global now a completely independent, for-profit, provider, we recommend that the Commission request that IROC undertake a formal review of adviser qualification and training requirements.

²⁵ E.g., Staff Report (SEC), "Study on Investment Advisers and Broker-Dealers" (January 2011) at viii, 4.

other developed markets, such as the U.K., the U.S., and Australia are far ahead of Ontario in addressing this issue.²⁶

If the Commission does not ultimately adopt and implement an explicit fiduciary duty, we ask that it publish guidelines regarding the precise legal duty that is owed especially given that certain sectors believe that a fiduciary obligation already exists while others do not. As we have previously indicated, all stakeholders in the marketplace would benefit from greater clarity on this issue.²⁷

b. Disclosure

We are pleased that the Commission is moving forward with the publication of rules relating to performance and cost reporting by investment dealers and advisers and is continuing its efforts to improve risk disclosure in the Fund Facts document and extend the application of the Point of Sale (“POS”) regime to other kinds of financial products. We have addressed these issues at length in prior submissions.²⁸

We appreciate that the Commission is working to implement these initiatives in a timely way; investors will benefit from earlier introduction of these disclosure requirements. While we support the re-examination of risk disclosure in the Fund Facts document, there are other issues with the POS regime that the Commission should also commit to reviewing.²⁹

The improvement of cost disclosure and performance reporting is a critical issue for retail investors.³⁰ This disclosure will reduce information imbalances in the adviser-advisee

²⁶ The SEC has the legal authority under s. 913 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, Pub. L. No. 111-203, 124 Stat. 1376 (2010) to impose a fiduciary obligation on financial dealers and advisers. Lori Schock, Director of the Office of Investor Education and Advocacy for the SEC, informed us that the SEC is working towards the introduction of this standard: IAP Conference Call with Individuals from Foreign Jurisdictions (March 9, 2012) (“IAP Conference Call”), minutes online:

http://www.osc.gov.on.ca/en/Investors_iap_meeting-agenda-minutes_index.htm. In Europe, Article 19(1) of the European Parliament and Council Directive on markets in financial instruments (No. 2004/39/EC) (*MiFID*) provides that “[m]ember States shall require that [...] an investment firm act honestly, fairly and professionally in accordance with the best interests of its clients”. This language is incorporated in Ch. 2.1.1 of the U.K. FSA’s *Conduct of Business Sourcebook*. Adam Phillips, Chairman, U.K. Financial Services Consumer Panel, provided an update as to the U.K.’s progress with regard to this issue during our March 9 call, *ibid*. Australia has already introduced a legal fiduciary standard as part of the “Future of Financial Advice” reforms, which goes into effect as a voluntary requirement on July 1, 2012, to become mandatory as of July 1, 2013: Australian Government, Treasury, “Future of Financial Advice”, online: <http://futureofadvice.treasury.gov.au/Content/Content.aspx?doc=home.htm>. See also IAP, “Re: OSC’s Notice 11-765 Statement of Priorities for Fiscal Year ending March 31, 2012” (April 27, 2011) at *fn.* 15 (“Re: SOP 2011-2012”); and, FAIR Response, *supra* note 21 at 2.

²⁷ E.g., *ibid*, Re: SOP 2011-2012 at 3-4.

²⁸ See IAP, “Re: OSC Notice and Request for Comments re Proposed Amendments to National Instrument 31-103: Cost Disclosure and Performance Reporting” (Sept. 23, 2011); and, IAP, “Re: Notice and Request for Comments re Implementation of Stage 2 of Point of Sale Disclosure for Mutual Funds – Proposed Amendments to NI 81-101 Mutual Fund Prospectus Disclosure, Form 81-101F3 and Companion Policy 81-101CP Mutual Fund Prospectus Disclosure and Consequential Amendments” (November 10, 2011) (“POS Submission”).

²⁹ Such as vague language and inadequate cost disclosure in the Fund Facts, and the premature removal of the simplified prospectus delivery requirement: *ibid*.

³⁰ E.g., Cyril W. Fleming, “Submission re: IAP’s Request for Input” (May 1, 2012) at 1 (“There is no meaningful record provided to clients of how much they pay for [investment] management” at 1 (on file with IAP); and Urquhart Comments, *supra* note 24 at 3-4; Brondesbury Report, *supra* note 5 at 8; and, IAC Report, *supra* note 5 at

relationship. It will bring to light conflicts of interests, enhance the comparability of different investment products, and enable investors to take a more active and inquisitive role regarding the costs, management, and performance of their investments. We ask that the Commission provide a timeline for the publication of these rules so as to ensure that the needs of retail investors remain a priority as these rules are finalized.

c. Reform of the Exempt Market

The exempt market is an area that has fallen outside of comprehensive regulatory oversight for a number of years, including during the financial crisis. The lack of oversight of ABCP is a case in point.³¹ Thus, we support the Commission's plans to review the exempt market. This examination should address not only the substantive exemptions that are available, but also retail investor access securities distributed under certain exemptions, the role of exempt market dealers and the suitability of existing exemptions for private placements.³²

The CSA's recent study of the minimum amount and accredited investor exemptions is an important first step. However, as we noted in our submission on this issue, a review of the entire exempt market regime, including resale rules (which are unduly complex) and national harmonization of these exemptions is also necessary.³³

In our view, the degree of access that investors have to products sold in the exempt market should be considered alongside the issue of whether advisers are subject to a fiduciary obligation to their clients.³⁴ A heightened duty on those who are selling products in the exempt market will provide further protection to investors, especially in cases where Commission oversight is minimal relative to that which occurs in the public markets. Finally, oversight of exempt market dealers is a longstanding issue.

We therefore ask that the SOP provide information about: when the CSA's review of the minimum amount and accredited investor exemptions will be completed and whether such a review might be broadened to include the exempt market generally; the scope and format of such extended research; any plans for public outreach and consultation, especially with retail investors; and a timeline for this research, outreach, and prospective legislative amendments.

In short, we believe that the Commission should identify its intended approach for a review of rules relating to the exempt market and set out a framework and timetable to deal with this multi-faceted issue.

14. This issue was also discussed during our Roundtable, *supra* note 17.

³¹ See Chant, *infra*.

³² E.g., the accredited investor ("AI"), private issuer, minimum amount, and short-term debt exemptions: see sections 3.3, 3.4, 3.10, and 3.35 of NI 45-106 – Prospectus and Registration Exemptions. The latter exemption, in particular, was used to sell ABCP to retail investors before the near-collapse of the non-bank segment of this market in 2007: see John Chant, *The ABCP Crisis in Canada: The Implications for the Regulation of Financial Markets* (Report for the Expert Panel on Securities Regulation, 2009) at 4. The OSC has also warned investment dealers/advisers about abuse of the AI exemption: Staff Notice 33-735, *supra* note 24.

³³ See IAP, "Re: CSA Staff Consultation Note 45-401 – Review of Minimum Amount and Accredited Investor Exemptions – Public Consultation" (February 29, 2012).

³⁴ *Ibid*, at 2 and 7.

d. Structured Products and Derivatives

We appreciate that the Commission is examining derivatives and other complex financial products, accounting for business conduct issues involved in the sale of these products to retail investors as well as macro-prudential considerations, such as systemic risk.³⁵ Derivatives seem to be a new area for manipulative and fraudulent activities.³⁶ The SOP aims to “undertak[e] research and analysis of increasingly complex financial products and strategies” and “continue the work on the creation of a framework to regulate OTC derivatives participants” are too slow-moving.³⁷ Clear standards should be developed to track the Commission’s progress in this area, with the aim that the Commission take a high profile role in policy development, surveillance and compliance, and enforcement of derivatives regulation in partnership with law enforcement and other financial regulators around the globe.

3.2.2. Securityholders’ Rights

Once their investment decision is made, securityholders have a number of other interests that require regulatory attention. Foremost among these is shareholder democracy. While the Commission appears to be ahead of other provincial securities regulators regarding this issue, we do not observe concrete progress in this area since the Commission’s publication of Staff Notice 54-701 in January, 2011.³⁸

In particular, shareholder voting standards in Ontario lag in certain respects behind those in other developed markets.³⁹ We endorse steps towards strengthening shareholder democracy, such as the elimination of slate voting and implementation of majority voting policies for director elections, as well as examination of measures to improve the effectiveness of the proxy voting system.⁴⁰ The Commission should ensure that the first two measures are legal requirements and indicate intentions to this effect in the SOP.⁴¹ The need for advisory votes on executive compensation should also be identified.

We agree with the Commission’s view that there is a need for greater research and empirical analysis of issues relating to shareholder democracy, but believe that this objective could be developed and made more concrete.⁴² We suggest that the Commission establish a task force review of shareholder voting in Canada,⁴³ or, if the periodic review of securities regulation is

³⁵ Urquhart Comments, *supra* note 24 at 2 (“as we saw in most income trusts, the Non Bank ABCP market and Sino Forest, the investment banking, derivatives, fixed income and/or equity specialists failed to do even basic due diligence”).

³⁶ The charges brought by the SEC against Goldman Sachs for fraud in the derivatives markets are a recent and prominent example: see Editorial (anon.), “After Goldman” *The New York Times* (April 21, 2010). See also, Stewart M. Lee, “views on OSC initiatives & the financial vertical-system,” email to the IAP (May 26, 2012) (on file with IAP).

³⁷ Draft SOP, *supra* note 6 at 4 and 6, respectively.

³⁸ OSC Staff Notice 54-701 – Regulatory Developments Regarding Shareholder Democracy Issues (January 14, 2011) (“54-701”).

³⁹ See, e.g., Holly J. Gregory, “International Comparison of Selected Corporate Governance Guidelines And Codes Of Best Practice,” Weil, Gotshal & Manges, LLP (Sept., 2008) at 171-185.

⁴⁰ Draft SOP, *supra* note 6 at 3-4; and, IAP, “Re: Staff Notice 54-701 (April 18, 2011) (“IAP Re: Shareholder Democracy.”

⁴¹ IAP Re: Shareholder Democracy, *ibid* at 2.

⁴² Draft SOP, *supra* note 6 at 4.

⁴³ IAP Re: Shareholder Democracy, *supra* note 40 at 6; see also Davies Ward Phillips & Vineberg LLP, “Discussion

established, this issue could be analyzed as part of that process. Such review should consider, among other issues: the mechanics of proxy solicitation procedures; the role of disclosure and ways to encourage greater retail investor participation in shareholder voting; and, strategies to protect minority shareholders from vote manipulation by arbitrageurs or dominant shareholders. The recent efforts of Telus Corp. to collapse its dual class share structure, only to be blocked by the arbitrage activities of hedge fund Mason Capital Management, highlight the importance of the latter issue and the need for regulatory attention to it.⁴⁴

3.2.3 Securityholders' Remedies

a. Public Enforcement

As we have mentioned in numerous previous submissions, restitution is a foremost concern for Ontario investors.⁴⁵ We recognize the complexities of introducing an explicit statutory compensation measure.⁴⁶ Yet such complexities, and the reservations they may engender, are outweighed by investors' need for reliable recovery of their financial losses. The alternatives are inadequate: the Commission's authority to order disgorgement is limited and little used; private litigation is costly, slow, and generally requires sizeable investment losses; and the Investment Industry Regulatory Organization of Canada's (IIROC) arbitration process requires legal representation and is only available for claims involving its own registrants.⁴⁷ The Commission has indicated that this issue would be better addressed under the aegis of a national securities regulator.⁴⁸ This prospect now seems unlikely, at least in the near future.⁴⁹ We believe therefore that the OSC needs to actively begin work to address this issue within a reasonable timeframe. We are greatly concerned by the absence of any intention to do so in the draft SOP.⁵⁰

We support the Commission's intention to focus on emerging market issuers as well as more timely and effective enforcement, including the use of stronger enforcement mechanisms and

Paper: The Quality of the Shareholder Vote in Canada" (October 22, 2010) at 175.

⁴⁴ This practice of "empty voting" (where investors "hold more votes than shares"), particularly where it is not disclosed, compromises the integrity of the voting process and could distort the outcomes of major corporate transactions: see Bernie S. Black and Henry T.C. Hu, "Hedge Funds, Insiders, and the Decoupling of Economic and Voting Ownership: Empty Voting and Hidden (Morphable) Ownership," 13 *Journal of Corporate Finance* 367 (2007) at 2, 3; and, Anita Anand, "Telus funds ignore governance," *The Financial Post* (April 27, 2012).

⁴⁵ Brondesbury Report, *supra* note 5 at 11; and, Dominic Vetere, "Submission re: IAP's Request for Input" (May 7, 2012) (expressing frustration at the lack of attention to investor redress by the Commission) (on file with IAP).

⁴⁶ See OSC, "OSC 2010-2011 Statement of Priorities Summary of Stakeholder Comments" (undated) ("Summary of Comments") at 2.

⁴⁷ The OSC has the authority to order disgorgement as part of a monetary sanction under s. 127(1) of the *OSA*, *supra* note 2; the court can also make an order for restitution: s. 122.1(1) *OSA*, *ibid*. This is not the same as an explicit statutory compensation mechanism for investors: such powers are entirely discretionary and rarely used. See OSC website, "Questions & Complaints", online: http://www.osc.gov.on.ca/en/Investors_questions-complaints_index.htm ("we do not normally recover money for investors"); see also Summary of Comments, *ibid* at 2.

⁴⁸ *Ibid*.

⁴⁹ See *Reference re Securities Act*, 2011 SCC 66.

⁵⁰ In 2007-2008, the Commission committed to "research and consider more effective means for the resolution of complaints and restitution." See OSC, "Statement of Priorities for fiscal 2007/2008" (June, 2007) at 8; and, Re: SOP 2011-2012, *supra* note 26 at notes 7, 8 (noting that this issue was still not addressed). These intentions have also been referred to in subsequent submissions, e.g., OSC "Staff Notice 33-736 – Annual Summary Report for Dealers, Advisers, and Investment Fund Managers" (2011) at 14-15. We have yet to see the results of this research.

more frequent quasi-criminal prosecutions. However, we have noted concerns with the OSC's recent enforcement proposals, in particular concerns regarding whistleblowing rules, no-contest settlements, restitution, and national harmonization of enforcement policies.⁵¹ The Commission's plans in respect of its enforcement proposals are largely (and conspicuously) absent from the SOP. For example, details should be provided about the status of whistleblowing rules and the proposed public consultation on no-contest settlements, which were mentioned or discussed in previous regulatory initiatives.⁵²

b. Private Enforcement (Shareholder Litigation)

We have concerns about the limitation period for shareholder class actions, especially in light of recent developments at common law which may greatly restrict eligible claims for these proceedings.⁵³ We add to the voices of investor advocates calling for the Commission to formally support reforms to provide for a longer (e.g. six-year) limitation period for securities class actions or otherwise amend the language of s. 138 of the *Securities Act* to address this important issue.⁵⁴ Private enforcement serves an important deterrent and compensation function and it should be given greater regulatory support.

c. OBSI

The Commission's explicit intention to address the issues regarding the Ombudsman for Banking Services and Investments ("OBSI") is commendable as this service fills a gap in the legislative regime. Ontario investors need access to low-cost, independent dispute resolution services to resolve financial complaints.⁵⁵ While it has little statutory influence in this area, the Commission could seek to (continue to) influence the CSA and other members of the Joint Forum of Financial Market Regulators, as well as the federal government, to ensure: that the ombuds service has statutory authority, including the power to make binding orders with limited rights of appeal; that participation is required for all firms in the financial services industry; and that these services are universal, i.e., encompassing disputes arising from the sale of any investment product, so as to simplify consumers' access to this regime. Above all, an ombuds service should be granted the power and resources that it needs to provide timely, effective and impartial decisions to investors, to bring Canada in line with international standards for financial dispute resolution

⁵¹ IAP, "Re: OSC Staff Notice 15-704 – Request for Comments on Proposed Enforcement Initiatives" (Jan. 16, 2012) ("IAP Re: 15-704").

⁵² OSC, "Staff Notice 15-704 – Request for Comments on Proposed Enforcement Initiatives" (Oct. 21, 2011); and, OSC, "Staff Notice 15-705 – Notice of Extension of Time for Public Comment on Proposed Enforcement Initiatives and Continuation of Public Consultation through a Policy Hearing" (Dec. 20, 2011).

⁵³ See, in particular, *Sharma v. Timminco Limited* 2012 ONCA 107 ("*Timminco*"). Some argue that 19 securities class actions currently filed under s. 138.3 of the *OSA* are at risk of being thrown out as a result of this decision: Urquhart Comments, *supra* note 24.

⁵⁴ The limitation period for securities class actions under s. 138.3 of the *OSA* is presently 3 years: *OSA supra* note 2 s. 138.14; see also the *Limitations Act*, S.O. 2002, c. 24, Sch B; Urquhart Comments, *supra* note 24; and, Ken Kivenko "Request for Comment Regarding Statement of Priorities for Financial Year to End March 31, 2013", Kenmar Associates (April 4, 2012).

⁵⁵ See IAP, "OBSI Comment Letter" (Feb. 1, 2012) ("OBSI Letter"). This issue was also raised by: Rosalind Ziegler, "Submission re: IAP's Request for Input" (April 23, 2012) ("There has to be single consistent Ombuds Service available to investors in Canada or our whole investment culture loses its integrity [...] the big banks have been allowed to 'pay off the judge'"); John Crerar, "Submission re: IAP's Request for Input" (April 4, 2012) (on file with IAP) ("The OBSI needs to be mandatory for all banks and financial institutions and be granted binding authority PERIOD"); this issue was also discussed during the Roundtable, *supra* note 17.

services.⁵⁶

It would be useful if the Commission provided details about efforts that it plans to undertake to support OBSI, in particular to enhance this office's authority over banks and the rest of the financial services industry. We hope that the Commission will work with IIROC and the Mutual Funds Dealers Association of Canada (MFDA) to ensure that financial services firms are not granted exemptions from participation in this regime. We add that the introduction of a fiduciary duty for financial advisers could reduce the number and seriousness of complaints *ex post* and thus help OBSI manage its caseload despite limited staff and resources.

4. Conclusions

In closing, we appreciate that the Commission reviewed our submission from last year and made useful amendments to its draft SOP. This year, we emphasize the following points:

- Performance reporting is a critical aspect of regulatory accountability. The Commission's progress should be regularly reviewed against comprehensive performance metrics as well as standards in other jurisdictions. Such reporting should be published, and provide for public input early and often during the policy development process.
- Many of last year's goals are repeated in this year's SOP. Policy initiatives should not remain on the regulatory agenda year after year without an update regarding progress.⁵⁷ In particular, there should be measurable progress towards the introduction of a statutory fiduciary duty in Ontario and the OSC should provide benchmarks in the SOP in support of this. A review of the exempt market, shareholder democracy issues, and investment products disclosure are additional areas that require concrete attention and progress. The Commission should accelerate its efforts to address these and other outstanding issues.⁵⁸
- Certain goals have fallen away, for example, restitution for investors. In the absence of a national securities regulator, the OSC should take a leading and active role in Canadian securities regulation, as it seemed to be doing in the area of shareholder democracy.⁵⁹ Such initiative should also be taken in other areas: restitution and class action limitation periods are two key examples.
- There are also some new goals, in particular emphasizing investor protection, research and data analysis, and systemic risk management. We support these objectives and ask that the Commission: provide explicit information about the governance of the Office of the

⁵⁶ Such as those standards in place in other common law countries, e.g., the U.K., Australia and New Zealand. See: OBSI Letter, *ibid* at 2; "Navigator Report", *supra* note 11 at 84-88; and, IAP Conference Call, *supra* note 26.

⁵⁷ Where a particular initiative is intended to be a multi-year project, it would be helpful if this were explicitly stated.

⁵⁸ As noted throughout this submission, many of these issues have been raised in the past: Reeve Submission, *supra* note 16; and, IAC Report, *supra* note 5.

⁵⁹ See 54-701, *supra* note 38. As the Commission noted in its 2012-2015 Strategic Plan: "The OSC must continue to regulate proactively in this fast-changing global environment amid growing public expectations. As the regulator of the greatest share of Canada's financial markets, the OSC has an obligation to respond appropriately to these challenges": Strategic Plan, *supra* note 11 at 8. We agree with this statement.

Investor; identify its specific plans for supporting dispute resolution mechanisms such as OBSI; establish comprehensive plans for the regulation and oversight of derivatives and other structured products commensurate with international standards and accounting for retail access to this market; and, work with the relevant parties to ensure the timely appointment of an independent committee to review Ontario securities legislation further to the requirement in the *Securities Act* to undertake this review.⁶⁰

We would very much like to see the Commission deliver on its substantive policy commitments in the upcoming year and we offer our full support for these efforts to improve securities regulation in Ontario and promote investors' interests.

Thank you for considering our comments.

Sincerely,

Anita I. Anand (Chair), Nancy Averill, Paul Bates, Stan Buell, Lincoln Caylor, Steve Garmaise and Michael Wissell.

⁶⁰ See *supra* note 4.

Appendix A

The following is a list of individuals from whom we heard or with whom we consulted in preparing this submission. The views expressed in this submission are ours alone and do not necessarily reflect those of the individuals listed below.

Roundtable Attendees

1. Preet Banerjee, personal finance expert, business journalist
2. Judy Cotte, Director of Policy Development and Chief Operating Officer, Canadian Coalition for Good Governance (CCGG)
3. Stephen Erlichman, Executive Director, CCGG
4. The Hon. Hal Jackman, former Lieutenant Governor of Ontario and former Chair of the Board of National Trust Company and the Empire Life Insurance Company
5. Peter Jarvis, Executive Director, Toronto CFA (Chartered Financial Analyst) Society
6. Marian Passmore, Associate Director, FAIR Canada
7. Glorianne Stromberg, securities lawyer, former commissioner of the Ontario Securities Commission (OSC)
8. Ed Waitzer, partner and former chair of Stikeman Elliott LLP, former chair of the OSC
9. Joel Wiesenfeld, partner, Torys LLP.

Meeting Attendees

1. Duff Conacher, Board Member, Democracy Watch
2. Doug Melville, Ombudsman and CEO, Ombudsman for Banking Services and Investments (OBSI)
3. Ermanno Pascutto, Executive Director, Canadian Foundation for Advancement of Investor Rights (FAIR Canada)
4. Ilana Singer, Deputy Director, FAIR Canada
5. Lindsay Speed, Research Associate, FAIR Canada

Conference Call Attendees

1. Adam Phillips, Chairman, U.K. Financial Services Consumer Panel
2. Lori Schock, Director of the Office of Investor Education and Advocacy for the U.S. Securities and Exchange Commission

Providers of Written Submissions

1. John Crerar, private investor
2. Pat Dunwoody, private investor
3. Cyril W. Fleming, private investor
4. Sandra L. Kegie, Executive Director, Federation of Mutual Fund Dealers, and Executive Director, Association of Canadian Compliance Professionals

5. Stewart M. Lee, Certified Investment Manager (Retired)
6. Ermanno Pascutto, Executive Director, FAIR Canada
7. Dr. Pamela J. Reeve, former member of the OSC Investor Advisory Committee
8. Diane Urquhart, independent financial analyst
9. Dominic Vetere, private investor
10. Rosalind Ziegler, private investor