BY EMAIL

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RE: OSC Notice 11-791 – Request for comment on the OSC's Statement of Priorities for the fiscal year ending March 31, 2022

The Investor Advisory Panel (IAP) welcomes this opportunity to comment on the Ontario Securities Commission's draft Statement of Priorities for the fiscal year ending March 31, 2022 (the "SoP"). The IAP is an initiative of the OSC to ensure investor concerns and voices are represented in the Commission's policy development and rulemaking process. Our mandate is to solicit and articulate the views of investors on regulatory initiatives that have investor protection implications.

Overview

As noted in the SoP, this coming year will be dominated by the COVID-19 pandemic and its effects – particularly its impact on people's health and financial security, and on the broader economy as well. The OSC almost certainly will have to remain in emergency response mode for some time to come. Priorities will need to be flexible and somewhat fluid. Non-essential requirements may have to be relaxed or eliminated altogether.

Nevertheless, the OSC must get important things done and must still get vital policies implemented, despite the pandemic. Determination to complete projects should now outweigh the temptation to reschedule them. Also, the ability to conceive, develop and implement 'smart' regulation in a timely manner will be more important than ever.

We continue to believe, as we said in a comment letter on this current year's Statement of Priorities, that:

> *"For Ontario and the rest of the country, economic recovery will depend on mobilizing investment capital – particularly to rebuild our small and medium-sized business sector – and participation by retail investors in that effort will be critical to its success."*

We noted that the ability and willingness of investors to support this effort will depend in large measure on their level of trust and confidence in regulatory investor protection. It is

heartening, therefore, to see investor protection highlighted in the SoP's primary goal of promoting confidence in Ontario's capital markets. Less heartening, however, is that in most instances the priorities associated with this goal – as articulated in the SoP – do not reflect the sense of urgency necessary to engender the investor confidence needed. We believe the OSC can and should rectify this by being more resolute in setting and executing its investor protection priorities for the coming year.

Our comments below are made with that approach in mind.

1. Implement the Client Focused Reforms

The Client Focused Reforms (CFRs) are far-reaching and multifaceted. They are intended to reform and improve many areas fundamental to the provision of appropriate investment advisory services. In particular, the CFRs are designed to clarify and reinforce the concept that the sale of financial products must be aligned with investors' best interests. These reforms are key to establishing confidence among retail investors that they can make investment choices on the basis of appropriate, reliable advice.

We appreciate that the emergence of COVID-19 prompted many operational adjustments earlier this year and necessitated a revision to the schedule for implementing elements of the CFRs. Fortunately, adaptation has been swift and successful. Now a commitment needs to be made to fully implement the CFRs on schedule by the end of 2021, and we urge the OSC to be steadfast in maintaining this deadline.

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

Canada's securities regulators took a long time to prohibit the payment of trailing commissions to order-execution-only (OEO) dealers. The inappropriateness of those payments was never seriously disputed, yet regulators' protracted process to reach agreement on a ban has cost investors a tremendous amount of money. Sadly, as a result of an extended implementation period that seems unnecessary and certainly over-long, investors will continue to bear these unwarranted costs for another year and a half.

This suboptimal outcome speaks to a rule-making process that is not conducive to fostering public confidence in how our capital markets are run. It is far too slow and, particularly as regards investor protection initiatives, it too often lacks a sense of urgency.

This needs to change if the OSC hopes to promote and maintain broad investor confidence in Ontario's capital markets. A meaningful first step toward signaling such a change would be to cease expending time and resources in designing regulations to permit the continued use of DSC options in the sale of mutual funds. The priority afforded this project is difficult to

rationalize given that all other CSA jurisdictions have banned DSCs and an increasing number of industry players have stopped offering them.

The façade of DSC necessity is gone, therefore; and instead efficiency, cost-saving, burden reduction and consumer confidence would all be better served by the OSC abandoning development of a convoluted framework just to preserve DSCs.

3. Improve the Retail Investor Experience and Investor Protection

While the SoP acknowledges a need to improve retail investor experiences and advance investor protection, the document's articulation of these imperatives lacks both urgency and specificity. The prioritized actions are predominantly described as consultations, considerations, research and collaborations with a scattering of continued implementation and continued expansion. The list is bereft of hard deliverables and specific target dates.

In contrast, we have seen lately clear evidence that the OSC can move very quickly and dynamically in response to industry needs and government directives. Investors expect the same agility and attentiveness from the OSC on issues and initiatives related to their protection.

As an example, it would be particularly timely for the OSC to re-define the qualification criteria for exempt market investing. The existing "tests" do not achieve the policy objective of accurately identifying investors with the knowledge and sophistication necessary to assess and navigate the risks of investing in the exempt market. This has been a longstanding concern, and it poses an even greater potential risk of serious harm if exempt market offerings proliferate as a means of channeling capital toward smaller businesses in the wake of the COVID-19 crisis. We therefore urge the OSC to prioritize development of a more appropriate mechanism for identifying individuals who truly have the investment sophistication needed to understand the risks involved in purchasing exempt market products.

4. Continue to Expand Systemic Risk Oversight

We support the commitment by the OSC to build a domestic derivatives framework to reduce potential risks, but the time and effort this project is appropriating serves as another cautionary tale. More than 10 years have elapsed since the global financial crisis that precipitated this regulatory initiative, yet the effort remains a work in progress with no clear end date in sight.

We appreciate that the OSC is sometimes hampered by the need for regulators to move in concert. But in today's radically dynamic financial market environment, regulatory response time should be measured in weeks and months, not years and decades. The OSC must – simply must – adopt this performance standard and find ways to achieve it.

We therefore encourage the OSC to conclude the derivatives framework project as soon as possible and then undertake an unsparingly candid post-mortem to identify process improvements and streamlining opportunities that can be incorporated to expedite future regulatory initiatives.

5. Bring Timely and Impactful Enforcement Actions

The SoP aptly states that "effective compliance and enforcement are essential to maintaining the integrity and attractiveness of our capital markets." However, the actual compliance and enforcement actions it lays out are somewhat bland and non-specific.

We encourage the OSC to use the coming year to provide clear and specific foreshadowing of the enforcement approach it will employ to address non-compliance with the CFRs. Additionally, we would welcome an indication that the OSC will reach out to other financial service regulators across the country, including other CSA jurisdictions, FSRA and the SROs, to identify opportunities to better co-ordinate and harmonize the enforcement of investor protection measures in Canada's financial service sector.

This is not just a desirable outcome. It is essential if Ontario and Canada are to maintain the integrity, credibility and attractiveness of our capital markets. For this reason, we particularly urge the OSC to spearhead an initiative among all financial services regulators in Canada to ensure immediate, automatic reciprocal enforcement – across all regulatory silos – of any order banning or suspending an individual following a finding that they lack integrity or are ungovernable.

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

From the perspective of the retail investor, this priority is one of the most important and impactful included in the SoP.

The SROs have been delegated responsibility for overseeing the transactional interface between industry and investor. It is the quality, integrity and professionalism of this interface that ultimately shapes investor experiences and outcomes. Consequently, the importance of identifying the SRO framework best suited to promote and safeguard that quality, integrity and professionalism cannot be overstated.

Our recent comment letter in response to the SRO framework review sets out our detailed views on what this framework should look like. For the purpose of the SoP, we would only note that the identification of a new go-forward SRO framework needs to be treated as a key regulatory statement and not simply a cost-saving exercise.

7. Strengthen Investor Redress through the Ombudsman for Banking Services and Investments (OBSI), and through Policy and Oversight Activities

We support this priority, but again find ourselves disappointed that the associated actions set out in the SoP lack both specifics and delivery dates. Also, we do not think that the OSC should limit the expansion of investor redress opportunities to OBSI-related initiatives. We instead reiterate our ask from last year that securing redress for harmed investors be regarded by the Commission as a fully appropriate and integral part of the OSC's enforcement function.

Specifically, we recommend that:

(a) funds recovered from wrongdoers be designated for distribution to harmed investors in all cases where harm has occurred (except where administering distribution of the funds would be demonstrably impractical); and

(b) settlement of enforcement proceedings and the final disposition of any order imposing terms or conditions be predicated on payment of full compensation to all harmed investors.

We also recommend that the OSC's priorities for 2021-2022 include an examination of the merits and feasibility of establishing a fund to compensate victims of investment fraud.

8. Additional matters

In terms of the three other goals set out in the SoP (reduce regulatory burden, facilitate financial innovation, and strengthen organizational foundation), we urge the OSC to maintain focus on the investor-related consequences and implications of those goals. In February 2019, in response to OSC Staff Notice 11-784 – Burden Reduction, we expressed our support for this initiative with the one stipulation that it not compromise the OSC's ability to promote fair and efficient markets and protect investors. We urge the OSC to maintain this vigilance in the coming year, particularly as follows:

(a) Financial Innovation

We support the OSC committing to become more proactive in facilitating financial innovation through its newly established Office of Economic Growth and Innovation. This commitment will require the investment of significant human and financial resources, yet we are unaware that any new sources of revenue have been provided to the OSC to fund this important new activity. Furthermore, current economic conditions are likely to have an adverse impact on the OSC's revenues, perhaps for several years to come, while at the same time the OSC will have to make significant investments in upgrading its technology platforms.

In this context, we urge the OSC to ensure that resources necessary to facilitate financial innovation are not allocated away from other critical functions, including investor protection. To prevent this from happening, we encourage the OSC to seek specific funding from the Ontario government for the work of the Innovation Office, while otherwise preserving the OSC's self-funding model.

(b) Streamlining Policymaking

According to the SoP, the COVID-19 pandemic has contributed to "the need and urgency for the OSC to have a strong organizational foundation of people, systems and data management and analytics". In response, the OSC has prioritized the ongoing redevelopment of CSA national systems, a modernization of its technology platforms and the promotion of a more inclusive and diverse workforce. We encourage and support the pursuit of all of these priorities, but we think this self-improvement initiative must go further. The pandemic has also underscored the importance of governments and regulators being nimble and responsive to the public's needs. This is likely to be an enduring expectation and one that the OSC should acknowledge and address at this time.

Meeting this expectation will require the OSC to re-think its issue identification and policy development processes. It has not been uncommon for important measures – especially investor protection initiatives – to take many years to reach completion, even when urgently needed. As we have noted above, the fairness, efficiency and competitiveness of Ontario's capital markets will be jeopardized going forward if the process for identifying and resolving regulatory issues does not become more streamlined.

For one thing, with regard to the OSC's formalized consultation process, we recommend opting for shorter rather than longer comment time periods whenever possible. We also continue to advocate for the use of stakeholder councils to brainstorm policy approaches in response to an issue the Commission or OSC Staff have identified as problematic.

These councils, comprising a representative group of leaders from the affected industry and investor advocacy communities, would be assembled on an *ad hoc* basis to deal with a specific matter. They would be asked to develop a recommended policy approach within a limited time frame, leaving the details to be worked out by OSC Staff. It is expected that the recommendations of stakeholder councils will be very practical and, therefore, will tend to garner less pushback from industry and from the advocacy community as the proposed policy advances through the public consultation process.[1]

[1] This is a similar to the aim of the Delphi method, which entails a group of experts who anonymously reply to questionnaires and subsequently receive feedback in the form of a statistical representation of the "group response," after which the process repeats itself. The goal is to reduce the range of responses and arrive at something closer to expert consensus.

We hope these comments will prove useful to the Commission as it considers and sets its priorities for 2021-2022. Please let us know if you require any clarification of, or elaboration on, our suggestions.

Sincerely,

Neil Gross, Chair
Investor Advisory Panel