May 3, 2002

Mr. Purdy Crawford
Chair, OSC 5 Year Review Committee
c/o Osler Hoskin Harcourt LLP
100 King Street West
Suite 6100
Toronto, Ontario
M5X 1B8

Dear Mr. Crawford:

Re: Proposed amendments to the Ontario Securities Act

We are writing on behalf of the Investment Dealers Association of Canada, the Mutual Fund Dealers Association and Regulation Services Inc. to solicit your support for amendments to provincial securities laws. Our agencies have been recognized in various provinces, conduct delegated registration functions on behalf of CSA members in some provinces and generally are the front line member and market regulators for the securities industry. Significant reliance has been placed on our regulatory programs by CSA members to ensure the integrity of the capital markets.

Our experience has demonstrated that the powers provided in our by-laws, rules and policies have generally proved sufficient to fulfill our enforcement mandate in the past. It is fair to say, however, in recent years the bar has been raised. Regulators have been called upon to meet significantly higher public expectations with respect to effectiveness and accountability. We have continued to address these issues through new regulatory agencies, additional resources, new technology tools, and policy reform. We believe it is appropriate to assess whether the legislative support for SRO regulation is adequate to meet these new standards. We propose, for your consideration, the following legislative changes to provincial securities laws. If approved, these changes will enhance our effectiveness and thereby, the confidence of the investing public in Canadian capital markets.

The amendments we seek would permit SRO's the following statutory powers:

1. Power to obtain investigation orders similar to those available to the Commission;

2. The ability to compel witnesses to attend and to produce documents at disciplinary hearings;

3. The ability to file decisions of disciplinary panels as orders of the court;

4. Statutory indemnification of SRO's from civil liability arising from negligence in the conduct of their enforcement responsibilities, and

5. The power to seek a court ordered imposition of a monitor at firms who are non-governable, on the cusp of insolvency or where public interest demands it.

SRO Investigation Orders

Generally, our powers are derived from contract between the market participants who are members of our Associations or who contract for our services. Employees, partners directors and officers of the Member firms acknowledge the jurisdiction of our agencies through the approval process. This includes the jurisdiction to take enforcement action against both Members and their approved employees for breaches of the by-laws, rules, and securities law.

Currently we can compel documents and testimony from the parties subject to our agreements. Many breaches of the regulations, however, involve the movement of securities or cash, and the ability to follow the paper trail is frustrated because there is no ability to compel third party records.

We recommend that there be an explicit provision for the issuance of an investigation order for SRO's. This would avoid any ambiguity that SRO's are entitled to such orders. The orders should be available "to assist in the administration and enforcement of any SRO bylaw, rule, policy or regulations relating to the regulation of the capital markets", and for the "due administration of the securities laws or the regulation of the capital markets; or to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction." We believe there is utility in a separate type of order that would be available to an SRO on application to the Commission that is similar to, but not the same as, an order that would be available to staff of the Commission in Part VI of the Ontario Securities Act.

More robust SRO investigation powers would relieve the Commission from having to take over investigations where our powers were insufficient to complete investigations. This would enhance our organizations' resources, the efficiency of investigations and the ability to protect the investing public. Recognition by the legislature of such a power, with the necessary checks and balances would enhance the critical functions of the SRO and provide for our ability to complete investigations on a more timely and complete basis.

Power to Compel Production of Documents and Witnesses to Attend Disciplinary Hearings

The second important legislative change we recommend is the power to compel documents and testimony at a discipline hearing. Currently we have the power to compel approved persons and Member firms that are subject to an agreement. However, in many instances, third party testimony and documents are unavailable in the absence of some form of compulsion. The result is that investigations and hearings are not pursued for lack of evidence.

In Alberta, SRO's have this power. Section 53.42 of the Alberta Securities Act includes the ability to summons and enforce the attendance of witnesses, the ability to compel witnesses to testify under oath, and the ability to compel the production of documents. The legislation also recognizes that tribunals must be able to sanction non-compliance and provides a right for the tribunal to seek a contempt order from the courts for non-compliance.

A similar precedent also existed in the former Vancouver Stock Exchange Act. Pursuant to Section 3.5, disciplinary panels of the Vancouver Stock Exchange were given the power to issue subpoenas for witnesses and documents. Such orders were deemed to be orders of the British Columbia Supreme Court and could result in contempt applications being heard by the Supreme Court for non-compliance. These are important powers for a tribunal to have in order that the tribunal be appraised of the best evidence. For your review and consideration, we have attached copies of both the Alberta and British Columbia legislation for your consideration

Power to File Disciplinary Decisions With the Courts and Deemed as Decisions of the Courts

Our third recommendation is to amend the securities legislation to permit our Disciplinary Decisions be filed with the court and to have the same effect as if they were orders of the court. Effective enforcement of discipline panel orders is critical to a credible regulatory regime. There is justifiable skepticism in a process that imposes well-publicized and substantial monetary penalties but provides no effective means to enforce the penalties. While our monetary penalties may be enforceable in the civil courts, the requirement to commence a civil action through a statement of claim and re-litigate the issues upon which the penalty was based is not practical. Where a registrant or a firm is not looking to maintain its registration or to continue operating as a registrant, there is little to compel individuals or firms to pay their fines, disgorgements or costs.

Currently section 53.43(2) the Alberta Securities Act, permits an SRO to file a certified copy of the discipline decision with the Clerk of the Court of the Court of Queen's Bench and that decision has the same force and effect as if it were a judgment of the Court of Queen's Bench. This provision eliminates the need to commence a civil action for the collection of such fines. A copy of section 53.3 of the Alberta Securities Act is attached for your information.

Statutory Immunity for Civil Liability for SRO's

Our fourth recommendation is that you consider statutory immunity for SRO's from civil liability arising from negligence in the conduct of their regulatory responsibilities. Our by-laws currently prohibit a Member from suing, however, our recent experience demonstrates that there are literally thousands of potential claimants who may suffer damages when action is taken against a Member firm in the public interest.

In addition, refusal to approve an application for membership in the current regulatory environment, essentially means the applicant is unable to carry on business. There is significant potential liability in this process as well.

The Commissions have immunity from civil claims for negligence in order that they not be deterred from vindicating the public interest by the threat of suit. We believe the same rationale applies to our Staff in the conduct of regulatory activity in the public interest. We recommend a provision similar to the protection afforded the Ontario Securities Commission and Commission staff in section 141 of the Ontario Securities Act. This provision would provide no shield against claims based on bad faith or malicious prosecution.

Power to Seek Judicial Imposition of a Monitor

Our fifth recommendation for legislative amendment is to provide standing to the IDA to apply for a court ordered monitor. To be clear, we do not require standing to seek the appointment of a receiver or trustee. The CIPF currently has standing to seek such an order in the event of an insolvency of a Member. Rather, we have found the need for a "half-way" house between firms which can continue under their management and firms which are insolvent. In some cases, non-compliance within the firm has reached the state that the SRO can no longer rely on the information being provided by the current management but it cannot be said with any assurance that the firm is bankrupt. For those cases, we recommend a legislative means of imposing a "monitor" to provide the SRO with reliable information and control over decisions within the firm that may not be in the clients best interests. It should be pointed out that Section 53.43 of the Alberta Securities Act currently provides SRO's with standing to seek the appointment of a receiver. We believe a "monitor" is essential to augment an SRO's power where a firm is ungovernable, seriously capital deficient or on the verge of insolvency or other circumstances where protection of the public are sufficiently serious to justify robust intervention. A copy of section 53.43 of the Alberta Securities Act is attached for your consideration.

With these changes the SRO's would have both the necessary flexibility and appropriate powers to ensure efficient, timely investigations and enforcement action. Your support would be sincerely appreciated. We would be very happy to discuss these issues with you to provide additional justification and clarification. Thank you for considering these recommendations.

Yours truly,

Paul C. Bourque
Senior Vice-President, Member Regulation
Investment Dealers Association of Canada

Larry M. Waite
Chief Operating Officer
Mutual Fund Dealers Association of Canada

Tom Atkinson
President & Chief Executive Officer
Market Regulation Services Inc.

Encl.