

INVESTOR ADVISORY PANEL

BY EMAIL

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RE: OSC Notice 11-788 – Request for comment on the OSC’s Statement of Priorities for the fiscal year ending March 31, 2021

The Investor Advisory Panel (IAP) is pleased to have this opportunity to comment on the Ontario Securities Commission’s Statement of Priorities for the fiscal year ending March 31, 2021. The IAP is an initiative of the OSC to bring investor perspectives into its policy development and rulemaking process in accordance with its mandate to protect investors from unfair, improper or fraudulent practices, to foster fair and efficient capital markets and confidence in them, and to contribute to the stability of the financial system and the reduction of systemic risk.

Overview

The year ahead will be dominated by the impact of the COVID-19 pandemic on people’s health and financial security as well as its effects on the broader economy.

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.

But the ability and willingness of investors to shoulder the risk inherent in supporting this effort, and the appropriateness of asking them to do so, depends in large measure on the degree to which they’re provided with the support and protection they will need to navigate the post-COVID investment landscape – an environment likely to be characterized by market volatility and burgeoning, potentially perilous, product offerings.

Most investors, especially vulnerable ones, will need dependable, expert guidance in the form of proficient, suitable, unbiased and cost-effective investment advice.

Therefore, now more than ever, it is essential that regulators elevate the proficiency and professionalism of investment advice to the highest standards, and establish unequivocally that the sale of financial products must be aligned with investors' best interests. These matters have taken on a new importance that goes beyond investor protection. They now touch and engage every aspect of the OSC's mandate, including the fostering of our capital markets and the maintenance of our financial system's stability.

So, while it is important for the OSC to be responsive to the pandemic-related challenges that issuers and investment firms face, at the same time the OSC has an equally important responsibility to deploy rapidly the measures needed to upgrade and enhance the professionalism of investment advice and the integrity of investment products sold in Ontario. In this context, we recommend that the OSC pursue the following measures with a renewed sense of purpose and urgency.

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 investment advisory services.

Earlier this year, with firms struggling to set up remote functionality in response to physical distancing requirements, it was understandable that CFR implementation preparedness had to be paused. But now, as a "new normal" emerges, it is essential that the CFRs be implemented on their most recently established timeline.

Simply put, these reforms cannot underpin safe and suitable retail investor participation in our economic recovery unless the reforms are up and running as soon as possible.

2. Implement the ban on OEO trailer fees

It took surprisingly long for Canada's regulators to reach agreement on prohibiting the payment of trailing commissions by fund organizations to order-execution-only (OEO) dealers who do not make a suitability determination. Now, when investment capital needs to be treated as a precious national resource that must not be eroded by excessive or unjustified fees, the implementation of this ban should be made a priority, and the OSC should be steadfast in insisting that it be put in place promptly.

3. Conclude the consultation on alternatives to a ban on DSCs

Similarly, it would be helpful if the OSC swiftly concludes its review of proposed alternatives to a ban on Deferred Sales Charges (DSCs) – preferably advising that Ontario should harmonize its position with the one adopted by every other jurisdiction in Canada.

As we noted in our April 24, 2020 [comment letter](#), all members of the Canadian Securities Regulators (CSA), including the OSC, recognize that DSCs harm investors and harm market efficiency, and provide no countervailing investor benefit now that alternatives with fewer restrictions are widely available.

Moreover, as we stated, the alternatives to banning DSCs proposed in the OSC's consultation paper would protect the most capable investors but leave unprotected many of the most inexperienced and vulnerable investors – an outcome incompatible with the OSC's mandate.

4. Improve redress for harmed investors

To backstop the measures noted above, and to reinforce the centrality of investor protection in the OSC's core mission, we urge the Commission to adopt a policy stance that securing redress for harmed investors is an appropriate and integral part of the OSC's enforcement function. We recommend, therefore, that the Commission's priorities for 2020-2021 include initiatives to consistently:

- (a) designate funds recovered from wrongdoers as monies to be distributed to harmed investors in all cases where harm has occurred (except where administering distribution of the funds would be demonstrably impractical); and
- (b) require that 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 2020-2021 include examining the merits and feasibility of establishing a fund to compensate victims of investment fraud. Further, pending consideration of our recommendation below regarding binding authority for the Ombudsman for Banking Services and Investments (OBSI), we encourage the establishment of a fund to cover claims that have been validated by OBSI but have not been rectified by an investment firm, though solvent – as such claims cannot qualify for coverage under the Canadian Investor Protection Fund.

5. Move forward on binding authority for OBSI in Ontario

To maintain full confidence in Ontario's capital markets, retail investors must feel assured that any disputes arising with their investment firms will be resolved in a fair, swift and cost-effective manner. Currently that confidence is at risk as the OSC and its counterparts across Canada struggle to find a way forward on the issue of granting the Ombudsman for Banking Services and Investments (OBSI) authority to make compensation orders that bind investment firms.

While we realize the CSA intends to continue focusing on this issue, we believe some forward momentum is needed to galvanize that focus into action. Accordingly, we urge the OSC to prioritize in the coming year an initiative to give OBSI binding decision-making authority for disputes involving investors resident in Ontario.

6. Continue upgrading the OSC's technological capacity

We recognize that current economic conditions are impacting the OSC's revenues and operating budget, and likely will do so for some time to come. Nevertheless, we expect the Commission will continue making significant investments in technology necessary to effectively oversee Ontario's capital markets. This must be done and rightly should be a high priority, as an essential component of the OSC's mandate to protect investors and to foster fair and efficient capital markets.

At a time when the province will be looking to support made-in-Ontario innovation and investment opportunities, we encourage the Commission to identify these investments as critical infrastructure and petition the Government for supplementary funding to accelerate their development and implementation.

7. Bolster the OSC's capacity in investor education

In addition to greater need for advisor proficiency and professionalism, there will be an ever-greater need ahead for effective investor education. Consequently, we recommend that the OSC make one of its top priorities the bolstering of resources and strengthening of capacity in the Investor Office, to ensure that the OSC continues to be a rich source of reliable, accessible information and learning for investors across Ontario and nationwide.

8. Improve sophistication criteria for exempt market investment

Existing financial qualification "tests" for exempt market investing bear no real relation to the policy objective of limiting access to these products to sophisticated investors. This has long been a concern, and it will result in increasing risk of harm if exempt market offerings proliferate as a means of channeling capital toward smaller businesses in the wake of the COVID-19 crisis.

We urge the OSC, therefore, 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.

9. Improve and accelerate policy development

The pandemic's myriad impacts have underscored the importance of governments and regulators being nimble and responsive to the public's needs. This is likely to be an enduring expectation that will serve as a reference point for evaluating the performance of all agencies, including the OSC, in future.

Although OSC Staff often seek early input on policy initiatives, at times there can be a sense that these consultations occur after much conceptual groundwork has been done and, consequently, to some extent "the cement has already been poured."

In addition, policy development often bogs down when objections are raised to these initial concepts; and the unrestrained repetition of arguments in sequential rounds of consultations only slows down the process further. As a result, it has not been uncommon for important measures – especially investor protection initiatives – to take many years to reach completion, even when urgently needed.

We encourage the Commission to take steps this year to fix these problems.

With regard to the OSC's formalized consultation process, we recommend opting for shorter rather than longer comment time periods wherever reasonably possible, and we suggest that the Commission actively discourage reiteration of previously articulated arguments, including repetition of boilerplate warnings about potential unintended consequences of regulatory action.

We also strongly recommend the use of stakeholder councils to conceptualize the policy approach that should be developed in response to an issue the Commission or OSC Staff have identified as problematic. These councils should each be assembled *ad hoc* to deal with specific matters, and they should comprise a representative group of leaders from the affected industry and investor advocacy communities. They should be given a limited period of time to come up with a recommended policy approach, leaving the details to be developed subsequently by OSC Staff.

If the stakeholder council's members agree on a solution to the problem, it can be expected that their suggested approach will be very practical and will generate less opposition than might otherwise be raised in more typical public consultations. But even where the stakeholder council fails to come up with a solution, they may be able to narrow the contentious issues. In some cases, they may conclude and advise that the matter is not actually as much of a problem as the Commission or Staff fear, or perhaps that the root problem lies elsewhere.

Given the potential benefits, we believe the Commission should experiment with this mechanism in an effort to streamline the OSC's policy development process.

We hope these comments will prove useful to the Commission as it considers and sets its priorities for 2020-2021. Please let us know if you require any clarification of, or elaboration on, our suggestions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil Gross".

Neil Gross, Chair
Investor Advisory Panel