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

Ms. Royal,

I welcome this opportunity to comment on the OSC's 2023-2024 Statement of Priorities (the SoP). As noted in the SoP, it is "the first that reflects the OSC's new organizational and governance structure, resulting from the recommendations of the Capital Markets Modernization Taskforce and the Spring 2021 Ontario Budget". The SoP does not, however, note that it also is the first drafted since the release of the Value-for-Money Audit of the OSC (the Audit) by the Office of the Auditor General of Ontario (the AGO). The absence of any reference to the Audit, and more importantly the failure to prioritize addressing any of its twenty-six recommendations is both perplexing and concerning.

I understand that it was neither practical nor necessary for the SoP to speak to each of the AGO's recommendation, but the failure to acknowledge and address the deficiencies identified by the Audit relating to investor perceptions and protections represent glaring omissions. While the Audit highlighted many areas where the OSC could improve regulatory processes and investor outcomes, the SoP is silent on virtually all of them. In particular, the SoP ignored the AGO's recommendations to improve and accelerate the rule-making process, to request additional powers to better protect investors and to pay out more from the fines and penalties it collects to harmed investors.

The SoP chooses not to prioritize addressing these investor-related issues and focuses instead on promoting initiatives related to fostering competition, capital formation and burden reduction. Of the nineteen priorities itemized in the SoP, only three are classified under the heading of "Strengthening Investor Safeguards." This demonstrable OSC preoccupation with responsibilities other than investor protection both defies and makes more poignant the admonition of its own IAP "that investor protection is the sine qua non of the OSC's mandate, the defining element of its purpose, and its cultural cornerstone." The SoP falls well short of manifesting this type of overarching commitment to investor protection.

In my view, the SoP fails to give adequate prominence to addressing key investor related issues and the three it does highlight lack the urgency and substance they deserve. The first one of these priorities is to expand the focus on retail investors through specific education, policy, research, and behavioural science activities. While a noble aspiration, I find it to be a problematic priority. For one thing, investor education/awareness is a recuring theme, albeit under slightly different headings, in just about every OSC Statement of Priorities in recent years. On this basis I think that it may be more appropriate to characterize it as a core function of the OSC rather than as a priority. To the extent, however, that the OSC continues to identify it as a priority, I urge that it begin to be treated as such. To constitute a priority, it is not adequate for the OSC to rely exclusively on lofty goals and feel-good platitudes to articulate investor education/awareness activities and objectives. Instead, it needs to employ the same discipline of evidence-based, transparent, and accountable processes and deliverables that it brings to bear on its other priorities. Absent a more well-defined approach and more clearly articulated objectives it will be difficult to assess the implementation and gauge the effectiveness of the OSC's efforts in pursuit of this priority.

The second priority under the "Strengthening Investor Safeguards" heading is to strengthen investor redress and the Ombudsman for Banking Services and Investments (OBSI). Substantively, I am pleased to see this initiative in the SoP, but it is both long overdue and not nearly as ambitious as it could be. The fact that binding authority for OBSI needs to be included in this 2023-2024 SoP serves to underscore the AGO's criticism that the regulatory decision-making process takes too long. It is now over a decade that independent evaluators, academics, and investor advocates have urged regulators to strengthen the complaint handling process by conferring binding authority on OBSI recommendations. While it is gratifying that the SoP indicates that the OSC will develop and publish for comment a proposal to provide OBSI with that authority, it is disappointing that this consultation took so long to happen and that its actual implementation date is neither specified nor assured. Also, binding authority is but one of many issues that make the complaint handling process so difficult for investors to navigate, let alone, obtain redress. By opting not to include any of these additional complaint handling and redress issues in the SoP, particularly considering that the AGO highlighted some of them in the Audit, the OSC contributes to the perception that government and industry have too much influence on its agenda and priorities.

The third priority under the "Strengthening Investor Safeguards" is to monitor and respond to the impacts of the DSC ban and the OEO ban. Again, while it is a worthy priority, I find it problematic. Recent history casts serious doubt on the ability of the OSC to follow through on this priority. Last year's statement of priorities included a similar commitment to monitor and enforce the implementation of Client Focused Reforms (CFRs). In accordance with this priority, when three of Canada's largest banks excluded third-party products from their branch-based financial planning divisions in response to know your product requirements stemming from the CFRs, the OSC launched a compliance review. This review was launched in December 2021 and to my knowledge its findings have yet to be released publicly and the banks have not reinstated third-party products. Given the apparent inability of the OSC to respond quickly and effectively to unintended consequences resulting from the implementation of the CFRs, what confidence can investors have in its ability to monitor and respond to any adverse impacts that may arise during the implementation of the DSC and OEO bans.

In my view, the SoP has at once too many priorities and too few that will effectively enhance investor protection. I therefore urge the OSC to revamp its list of priorities to better focus on strengthening investor safeguards and only pursue those additional initiatives that will make a meaningful difference for all Ontarians. Recasting the SoP in this way will help re-establish investor trust in the OSC and build confidence in Ontario's capital markets. Other priorities currently included in the SoP can be assigned to other CSA jurisdictions to better optimize regulatory output and minimize duplication of effort.

I thank you for providing this opportunity to comment on the SoP and authorize you to make it available publicly on your website.

Sincerely,
Harvey S. Naglie