

May 18, 2012

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**RE: Ontario Securities Commission Notice 11-766 – draft 2012-2013 Statement of Priorities**

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FAIR Canada is pleased to offer comments on the draft Ontario Securities Commission (“OSC”) 2012-2013 Statement of Priorities (the “**Draft Statement**”), contained in OSC Notice 11-766 dated March 30, 2012 (the “**Notice**”).

FAIR Canada is a national, non-profit organization dedicated to putting investors first. As a voice of Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit [www.faircanada.ca](http://www.faircanada.ca) for more information.

**FAIR Canada Comments and Recommendations – Executive Summary**

General comments

1. FAIR Canada is very supportive of the overall direction of the OSC’s Draft Statement. We are encouraged by the focus on investor protection, the OSC’s dedication to keeping pace with national and international market developments, and its willingness to evolve in order to be an efficient and effective regulator. We recommend that the OSC make some of its priorities more concrete and measurable in order to allow both the OSC and stakeholders to measure its progress against its stated goals.
2. FAIR Canada fully supports the OSC’s plan to publish a report on its progress against its 2011 – 2012 priorities.
3. FAIR Canada suggests that the OSC consider adding last year’s broad priority “Demonstrate Accountability for its Performance as a Leading Securities Regulator in Canada” as a sixth goal within the Draft Statement.
4. FAIR Canada supports the OSC’s commitment to research and empirical evidence. Where there are clear risks posed to investors or where harm has been inflicted, FAIR Canada believes that

regulators need to act more swiftly to make changes to ensure that investors are protected from unfair, improper or fraudulent practices, in order to fulfill their mandates.

FAIR Canada strongly supports many of the priorities outlined

5. **Office of the Investor** - FAIR Canada strongly supports the OSC's initiative to create an Office of the Investor ("OI") to establish a stronger investor focus and understanding. FAIR Canada recommends that the OSC publicly disclose the OI's mandate, goals, composition and future initiatives as soon as possible. FAIR Canada recommends that the OI's mandate focus primarily on retail investors, as they are the most vulnerable investor group and in the greatest need of protection.
6. **Client-Advisor Relationship Research** - FAIR Canada eagerly anticipates the release of the OSC's research regarding the client-advisor relationship. We recommend that the OSC set a target publication date for the paper in its final Statement of Priorities. FAIR Canada believes that a best interest standard must be introduced in order to protect investors, and urges Canadian regulators to do so promptly to keep pace with other leading international jurisdictions.
7. **Cost of Mutual Funds** - FAIR Canada is pleased that the OSC intends to conduct research and analysis and publish a discussion paper on the cost of ownership of mutual funds in Canada, identifying investor protection and public interest issues.
8. **OBSI** - FAIR Canada fully supports the OSC's commitment to continue to work with the Ombudsman for Banking Services and Investments ("**OBSI**") and the Canadian Securities Administrators ("**CSA**") to support a sustainable and robust system of informal dispute resolution for investors. FAIR Canada also fully endorses the implementation of a system where OBSI decisions are binding over participating firms.
9. **Emerging Markets** - In FAIR Canada's view, there is an urgent need for a fundamental review of emerging market offerings in Canada. FAIR Canada recommends the establishment of a task force to examine the risks posed to Canadian investors and the reputation of Canadian markets by listings from China and other emerging markets. We also suggest that Canadian securities regulators develop and publish concrete plans to address weaknesses in the current system (with respect to underwriting, accounting, regulating, etc.) and include target dates for implementation.
10. **Exempt Market** - FAIR Canada has identified the exempt market as an area of great risk to investors. We support the OSC's initiative to consider and consult on alternate capital raising exemptions in Ontario in addition to the accredited investor and \$150,000 exemption. Any exemptions considered must ensure that investors who qualify are adequately protected.
11. **Enforcement** - FAIR Canada supports stronger, more meaningful sanctions against those who violate securities laws, particularly where investors are harmed or put at risk. We urge the OSC to launch a whistleblower program as soon as practicable. FAIR Canada also recommends that the OSC commit to working with the Ontario Government to explore a mechanism by which the

OSC could award compensation to Ontario investors who suffer losses because of violations of the *Securities Act* (Ontario).

FAIR Canada suggests additional issues for consideration

12. **Non-SRO Member Registrants** - In FAIR Canada’s view, non-SRO member registrants pose greater risks to investors than SRO member registrants, and require closer oversight than is currently provided. Furthermore, non-SRO member registrants do not participate in compensation funds that protect investors in instances of registrant insolvency. FAIR Canada encourages the OSC to address these issues.
13. **Commission Appointments** - FAIR Canada suggests that the OSC make a commitment to appoint one or more Commissioners with a strong retail investor background and perspective within the next year.
14. **Leverage** - FAIR Canada recommends that the OSC add an initiative to its Draft Statement to examine the prevalence of inappropriate investment recommendations involving the use of leverage under its first goal (“Deliver Responsive Regulation”).
15. **Group Scholarship Plans** - FAIR Canada suggests that the OSC closely review the propriety of continuing to permit group scholarship plans to be sold in Canada in light of the design of such plans, the aggressive manner in which they are marketed and advertised, and the misalignment of incentives between the salespersons and consumers and consider introducing substantive regulation to address current abuses.
16. **TSX Conflicts of Interest** - FAIR Canada recommends that the OSC address within its Draft Statement “the perception that the TSX falls below international standards with respect to the separation of its regulatory and commercial activities”<sup>1</sup>.
17. **Registration Database** - FAIR Canada recommends that Canadian securities regulators provide an informative, comprehensive, “one-stop” national system for investors to check registration, background information (including proficiency and disciplinary history), and SRO membership and background information for all registered firms and individuals. We would like to see the OSC identify this as an issue of importance in its final Statement of Priorities.
18. **Incorporation of Registrants** - FAIR Canada urges the OSC to oppose any efforts to permit the incorporation of individual registrants in Ontario.

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<sup>1</sup> Standing Committee on Government Agencies, “Report on Agencies, Boards and Commissions: Ontario Securities Commission” (March 2010), online: <[http://www.ontla.on.ca/committee-proceedings/committee-reports/files\\_pdf/OSC%20Report%20English.pdf](http://www.ontla.on.ca/committee-proceedings/committee-reports/files_pdf/OSC%20Report%20English.pdf)>, at page 35.

**1. General comments.**

- 1.1. FAIR Canada is very supportive of the overall direction of the OSC’s Draft Statement. We are encouraged by the focus on investor protection, the OSC’s dedication to keeping pace with national and international market developments, and its willingness to evolve in order to be an efficient and effective regulator. We recommend that the OSC make some of its key initiatives more concrete and measurable, in order to allow both the OSC and stakeholders to measure its progress against its stated goals.
- 1.2. We are pleased that the OSC has indicated in the Notice that it plans to publish a report on its progress against its 2011 - 2012 priorities on the website shortly after the conclusion of the 2011 - 2012 fiscal year. FAIR Canada supports this initiative, and suggests that providing more concrete and measurable priorities in this and future priority statements will assist in this exercise in the future. We note that the 2011 – 2012 priority “Demonstrate Accountability for its Performance as a Leading Securities Regulator in Canada” was excluded from the Draft Statement, and suggest that this be added as a priority for the 2012 – 2013 fiscal year.
- 1.3. With the above-noted comment in mind, FAIR Canada would also like to see more measurable goals included in the Draft Statement, particularly a commitment to take prompt action based on the findings of its research and a commitment to be transparent by providing public access to the results of its research.
- 1.4. FAIR Canada fully supports the OSC’s commitment to research and empirical evidence to develop well-reasoned policy that leads to the intended outcome(s). However, we are concerned that research projects could inhibit progress in areas where there is a clear and urgent need for regulatory action. We suggest that a balance be struck between empirical research on issues where the extent and prevalence of investor harm is not clear and issues that pose real and obvious threats to investors. Where there are clear risks posed to investors or where there is evidence that harm has been inflicted, FAIR Canada believes that regulators need to act more swiftly to make changes to ensure that investors are protected from unfair, improper or fraudulent practices, in order to fulfill their mandates.

**2. FAIR Canada strongly supports many of the priorities outlined.**

- 2.1. In particular, FAIR Canada supports:
- 2.2. **Office of the Investor (“OI”)** – FAIR Canada strongly supports the OSC’s initiative to create an OI to establish a stronger investor focus and understanding within the Commission. FAIR Canada recommends that the OSC publicly disclose the OI’s mandate, goals, composition and future initiatives as soon as possible. We note that an OSC Investor Secretariat was formally announced in early 2010 but it is not clear whether the Investor Secretariat was established or how it was staffed and funded. FAIR Canada is optimistic that the OI will have the full support of the OSC, given that the OSC’s 2012-2013 budget includes funding to establish and staff the office. We hope that the OI will be up and running by summer 2012, and are encouraged that the OSC has requested applications for the Director, Office of the Investor position. We note that the Draft

Statement does not include a timeframe for the creation and staffing of the OI, and recommend that the OSC include within the final Statement of Priorities a deadline for the OI to begin its important work.

- 2.3. In FAIR Canada’s opinion, a strong, effective, investor-focused leader it is essential to the success of the OI. We recommend that the OI report directly to the OSC Chair, in line with the OSC’s Strategy 2 (i.e. better identify and address investor issues at the highest levels of the organization).<sup>2</sup> FAIR Canada also suggests that public investor consultations fall within the ambit of the OI, in order to facilitate “constructive engagement with investors”<sup>3</sup>. We recommend that the OI mandate focus primarily on retail investors, as they are the most vulnerable investor group and in the greatest need of protection.
- 2.4. FAIR Canada suggests that the OI be directed to engage with the Investment Industry Regulatory Organization of Canada (“**IIROC**”), the Mutual Fund Dealers Association of Canada (“**MFDA**”) and OBSI on relevant investor issues. These organizations could provide great insight into identifying and addressing investor issues, and could provide timely intelligence on emerging areas of concern.
- 2.5. FAIR Canada also suggests that the OSC add the OI’s representation on the OSC’s new Policy Coordination Committee as part of its 2012 – 2013 priorities.
- 2.6. **Plan to Reconsider to Client-Advisor Relationship (Fiduciary Duty)** – FAIR Canada was very pleased to see the OSC’s commitment to this research in its 2011-2012 Statement of Priorities, which we understood was to be released in the fall of 2011. We believe that Canadian securities regulators need to advance this issue without delay and implement the appropriate higher duty; such initiatives are already under way in other leading international jurisdictions. FAIR Canada recommends that, at a minimum, the OSC set a target publication date for the paper in its final Statement of Priorities.
- 2.7. While FAIR Canada is supportive of clearer disclosure to investors, particularly with respect to costs and fees, academic evidence indicates that disclosure in isolation does not always serve its intended purpose, and can lead to unexpected and undesirable advice and investor behaviour, especially when it comes to the disclosure of a conflict of interest.<sup>4</sup> FAIR Canada believes that a best interest standard must be introduced in order to protect investors, and urges Canadian regulators to do so promptly to keep pace with other leading international jurisdictions.
- 2.8. **Cost of Mutual Fund Ownership** – FAIR Canada believes that examining the cost of mutual fund ownership in Canada should be a very high priority for the OSC, given the \$813 billion<sup>5</sup> of savings

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<sup>2</sup> Ontario Securities Commission, “2012 – 2015 Strategic Plan – The OSC: A 21<sup>st</sup> Century Securities Regulator”, online: <[http://www.osc.gov.on.ca/documents/en/Publications/pub\\_20120228\\_osc-2012-2015-strategic-plan.pdf](http://www.osc.gov.on.ca/documents/en/Publications/pub_20120228_osc-2012-2015-strategic-plan.pdf)>.

<sup>3</sup> *Ibid.*

<sup>4</sup> Cain, Daylian M., Loewenstein, George and Moore, Don A., “The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest” (2005) 34 J. Legal Stud. 1, available online: <<http://sds.hss.cmu.edu/media/pdfs/loewenstein/DirtOnComingClean.pdf>>.

<sup>5</sup> Investment Funds Industry of Canada, “IFIC Industry Overview March 2012”, online: <<http://statistics.ific.ca/English/Reports/MonthlyStatistics.asp>>.

invested in the Canadian mutual fund industry. FAIR Canada is pleased that the OSC intends to conduct research and analysis and publish a discussion paper on the cost of ownership of mutual funds in Canada with a view to identifying investor protection and public interest issues. FAIR Canada suggests that the OSC make recommendations in its discussion paper aimed at ensuring that mutual fund costs are fair to Canadian consumers and that mutual fund investors receive clear and measurable value for the costs they pay. The current system does not promote competition on mutual fund fees – instead it promotes competition among funds to pay higher trailer fees to registrants to encourage them to sell the funds that offer the highest commissions.

- 2.9. FAIR Canada also echoes Kenmar Associates’ call for a review of mutual fund advertising and marketing. It is important that Canadian securities regulators implement and enforce requirements that ensure that advertising is fair, balanced, and objective so that retail investors are not misled.
- 2.10. **OBSI** – FAIR Canada fully supports the OSC’s commitment to continue to work with OBSI and the CSA to support a sustainable and robust system of informal dispute resolution for investors. FAIR Canada strongly supports OBSI as the single independent ombuds service for consumers’ financial complaints. It is essential that Canadian financial consumers have a single, free, external dispute resolution service provider that is, and is perceived to be, impartial and accessible to retail financial consumers.
- 2.11. FAIR Canada also fully endorses binding power for OBSI decisions over participating firms, as was recommended in the 2011 Independent Review of OBSI.<sup>6</sup>
- 2.12. **Emerging Markets** – In FAIR Canada’s view, there is an urgent need for a fundamental review of emerging market offerings in Canada. We support the OSC’s initiative, included in the Notice, to “[c]ontinue to work with national and international enforcement regulators to develop a comprehensive response to emerging market issues.”<sup>7</sup>
- 2.13. The Emerging Markets Issuer Review<sup>8</sup> (“**EMIR**”) issued by the OSC was a positive, preliminary step, but it failed to address broader issues relating to the regulation of emerging market listings. FAIR Canada had hoped that the EMIR would ask key questions such as “Do Canadian regulators have the ability to regulate, investigate, and prosecute these companies?” and “If Canadian regulators do not have the ability to properly regulate these offerings, should they permit these listings in Canada?” We believe a task force would be an appropriate body to grapple with such important questions.
- 2.14. FAIR Canada was disappointed that the OSC’s EMIR failed to identify the role of the OSC and other Canadian securities regulators in market participant oversight. While it is important to address the individual roles of market stakeholders such as auditors and underwriters, it is

<sup>6</sup> The Navigator Company, “Ombudsman for Banking Services and Investments: Report – 2011 Independent Review”, online: <[http://www.obsi.ca/images/document/Independent\\_Review\\_of\\_OBSI\\_2011\\_2.pdf](http://www.obsi.ca/images/document/Independent_Review_of_OBSI_2011_2.pdf)>, at page 31.

<sup>7</sup> OSC Notice 11-766 – Statement of Priorities Request for Comment (March 30, 2012), (2012) 35 OSCB 3010.

<sup>8</sup> OSC Staff Notice 51-719 (March 20, 2012), online: <[http://www.osc.gov.on.ca/documents/en/Securities-Category5/sn\\_20120320\\_51-719\\_emerging-markets.pdf](http://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20120320_51-719_emerging-markets.pdf)>.

essential that Canadian regulators also answer fundamental questions about the regulation of emerging market listings. The EMIR did not address the conflicts of interest that arise between the TSX's listings regulation function and its listings business to determine the extent to which this conflict contributes to the problems it identified. Additionally, the EMIR did not set out how the weaknesses that were identified are to be addressed, nor did it set target dates to fix them.

- 2.15. FAIR Canada recommends that Canadian securities regulators develop concrete plans to address weaknesses in the current system (with respect to underwriting, accounting, regulating, etc.) and include target dates for implementation. FAIR Canada strongly recommends the establishment of a high-level task force (comprising industry representatives as well as regulators) to examine the risks posed to Canadian investors and the reputation of Canadian markets by listings from China and other emerging markets.
- 2.16. **Exempt Market** – FAIR Canada has identified the exempt market as an area of great risk to investors. We support the OSC's initiative to consider and consult on alternate capital raising exemptions in Ontario in addition to the accredited investor and \$150,000 exemption. FAIR Canada provided extensive comments<sup>9</sup> in response to the CSA's review of the minimum amount and accredited investor exemptions, and pointed out the need for more data regarding the exempt market in Canada. Any exemptions considered must ensure that investors who qualify are adequately protected.
- 2.17. **Enforcement** – FAIR Canada supports the OSC's initiatives to “[p]romote vigorous and timely enforcement action by reducing timelines for completing investigations and initiating regulatory proceedings”<sup>10</sup> and “[i]ncrease the use of stronger enforcement mechanisms and increase quasi-criminal prosecutions”<sup>11</sup>. We fully support stronger, more meaningful sanctions against those who violate securities laws, particularly where investors have clearly been harmed or put at risk.
- 2.18. FAIR Canada provided comments in response to an OSC request for comments regarding proposed enforcement initiatives in December 2011<sup>12</sup> (the “**Enforcement Consultation**”). While FAIR Canada supported the OSC's goal of increasing its effectiveness in protecting the public interest, we expressed concerns about particular initiatives the OSC had proposed, particularly no-contest settlements.
- 2.19. The Enforcement Consultation indicated that staff had been examining the prospect of introducing a new whistleblower program. FAIR Canada urges the OSC to launch a whistleblower program as soon as practicable so that it can gain valuable information that it may not otherwise obtain and in order to aid in carrying out its mandate to protect investors and foster confidence in our capital markets. Such a program would also lead to more timely detection of wrongdoing

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<sup>9</sup> FAIR Canada comments RE: Review of Minimum Amount and Accredited Investor Exemptions (February 29, 2012), online: <<http://faircanada.ca/wp-content/uploads/2011/01/120229-FAIR-Canada-submission-re-MA-AI-exemptions.pdf>>.

<sup>10</sup> *Supra*, note 7.

<sup>11</sup> *Ibid.*

<sup>12</sup> (2011) 34 OSCB 10720, Request for Comments on Proposed Enforcement Initiatives (October 21, 2011).

and fraud. We also recommend that regulators consider introducing rules that require all registrants to report potential serious misconduct by other registrants.

2.20. The OSC's 2011 – 2012 Statement of Priorities had as a priority “Work with the Ontario Government to explore a mechanism by which the OSC could award compensation to Ontario investors who suffer losses because of violations of the *Securities Act (Ontario)*”<sup>13</sup>. FAIR Canada recommends that the OSC make a commitment to do so in its 2012 – 2013 Statement of Priorities. As recommended by the Standing Committee on Government Agencies' Report on the OSC<sup>14</sup> (the “**SCOGA Report**”), the OSC should have the “power to make restitution orders when there has been a violation of securities law”<sup>15</sup>.

### 3. FAIR Canada suggests additional issues for consideration.

- 3.1. In addition to the priorities included in the Draft Statement, FAIR Canada recommends that the OSC consider the following before it finalizes its Statement of Priorities for 2012-2013:
- 3.2. **SRO Oversight and Compensation Fund Coverage** – In its submission to the OSC on its 2011-2012 draft Statement of Priorities, FAIR Canada recommended that the OSC publish a policy paper by the end of 2011 which would propose a requirement that all registrants be backed by a compensation fund, either through mandatory SRO membership or the creation of a new fund, in order to protect investors in the event of insolvency of a registrant. In FAIR Canada's view, non-SRO member registrants pose greater risks to investors than SRO member registrants, and require closer oversight than is currently provided.
- 3.3. **FAIR Canada and the MFDA have each issued reports (A Decade of Financial Scandals<sup>16</sup> and Regulatory Gap in Canada – Part II<sup>17</sup>, respectively) which identify a serious gap in coverage for investors in the event of the insolvency of a registrant. This is a serious defect in our system.** FAIR Canada recommends that the OSC undertake its own analysis of the compensation fund gap and issue a policy paper by March 31, 2013 which will propose a system through which all registrants will be backed by a compensation fund.
- 3.4. **Investor-Representative Commissioners** – The SCOGA Report called for the appointment of one or more Commissioners specifically responsible for representing the interests of retail investors.<sup>18</sup> FAIR Canada urges the OSC to make this one of its commitments for 2012-2013. FAIR Canada also recommends that the OSC include a commitment that, in 2012-2013, it will publish a comprehensive response addressing all recommendations made in the SCOGA Report.

<sup>13</sup> Ontario Securities Commission, 2011 – 12 Statement of Priorities, online: <[http://www.osc.gov.on.ca/documents/en/Publications/sop\\_fiscal-2011-2012.pdf](http://www.osc.gov.on.ca/documents/en/Publications/sop_fiscal-2011-2012.pdf)>.

<sup>14</sup> *Supra*, note 1, at page 22.

<sup>15</sup> *Ibid.*, at page 24.

<sup>16</sup> FAIR Canada, “A Decade of Financial Scandals” (February 2011), online: <[http://faircanada.ca/wp-content/uploads/2011/01/Financial-scandals-paper-SW-711-pm\\_Final-0222.pdf](http://faircanada.ca/wp-content/uploads/2011/01/Financial-scandals-paper-SW-711-pm_Final-0222.pdf)>.

<sup>17</sup> Mutual Fund Dealers Association, “Regulatory Gap in Canada – Part II - Fund Managers: The Need for a Compensation Fund” (November 20, 2008), online: <<http://www.mfda.ca/regulation/bulletins11/Bulletin0469-P.pdf>>.

<sup>18</sup> *Supra*, note 1, at page 26.

- 3.5. FAIR Canada has great respect for all Members of the Commission and recognizes that Members currently take the retail investor perspective into consideration in the course of their duties. This recommendation is not intended as a criticism of any of the current Members. However, current Members of the OSC are persons with considerable experience representing and working with stakeholders other than retail investors. Based on our review of Member biographies, no part time Commissioner of the OSC has extensive experience in primarily representing the interests of retail investors.
- 3.6. **Leverage** – FAIR Canada is concerned that many investors are being inappropriately encouraged to borrow to invest and that there are inappropriate contractual relationships between registered firms, mutual fund companies, and financing companies to provide preferential rates on investment loans to investors. Specifically, FAIR Canada is concerned that leverage is commonly being recommended to be used to invest in mutual funds, which we view to be inappropriate in the majority of cases. The OSC released an investor warning regarding the risks of leveraged investing in January 2012 but more concrete action is needed.<sup>19</sup>
- 3.7. FAIR Canada recommends that the OSC add an initiative to examine the prevalence of this problem, particularly focusing on mutual and other investment funds, under its first goal (“Deliver Responsive Regulation”). In our view, there should be a presumption that leveraged investing is unsuitable for retail investors, particularly with respect to the sale of mutual funds and similar collective investment funds, and it should be up to registrants who encourage this practice to prove that such an investment strategy is suitable for that particular investor. FAIR Canada has written to the CSA to raise this issue, stating that current suitability requirements do not provide adequate investor protection with respect to leveraged investing.
- 3.8. **Group Scholarship Plans** – FAIR Canada believes that improved disclosure is inadequate to provide an acceptable level of protection for the vulnerable consumers such plans frequently target. We believe that disclosure alone will only create the illusion of consumer protection and cannot be an end in itself given the problems with the design of group scholarship plans, the aggressive manner in which they are marketed and advertised, and the misalignment of incentives between the salespersons and consumers. Many purchasers of these plans are modest or lower income Canadians who often have low financial literacy and are urged to invest in these plans in order to take advantage of the government grants associated with them. FAIR Canada is of the view that group scholarship plans are generally poor savings vehicles with little or no benefits to consumers.
- 3.9. As noted by the CFA CAC, “[o]ne might question whether scholarship plans, something deemed suitable for retail investors but sold by commissioned sales agents with minimal licensing standards, fits within an enhanced investor protection model and would be permitted by the CSA if it was a new product.”<sup>20</sup> FAIR Canada agrees with this statement and recommends that the

<sup>19</sup> Ontario Securities Commission, “Important information about the risks of leveraged investing and costs of investing” (January 23, 2012), online: <[http://www.osc.gov.on.ca/en/Investors\\_inv\\_news\\_20120123\\_cost-investing.htm](http://www.osc.gov.on.ca/en/Investors_inv_news_20120123_cost-investing.htm)>.

<sup>20</sup> The Canadian Advocacy Council for Canadian CFA Institute Societies, Letter Re: Scholarship Plan Prospectus Form (January 16, 2012), online: <[http://www.osc.gov.on.ca/documents/en/Securities-Category4-Comments/com\\_20120116\\_41-101\\_summersk.pdf](http://www.osc.gov.on.ca/documents/en/Securities-Category4-Comments/com_20120116_41-101_summersk.pdf)>.

OSC closely review the propriety of continuing to permit such products to be sold to Canadian consumers and consider introducing substantive regulation to address current abuses (for example, limiting fees to ten percent of contributions in any given year).

- 3.10. **Exchange Conflicts of Interest** – In July 2009, FAIR Canada released an expert report<sup>21</sup> (the “**TSX Report**”) that identified conflicts of interest that exist between the TSX’s self-regulatory responsibilities and its business activities. The TSX Report outlined how similar conflicts have been addressed in several important developed markets, including the US (both NYSE and NASDAQ), the UK, Australia and Hong Kong. The TSX Report found that all of the other seven major exchanges reviewed have addressed their conflicts of interest by implementing one of three specific and sound approaches to conflict of interest management. **The TSX was the only exchange among this group that has not implemented specific measures to manage its conflict of interest in regulating listed companies.** The TSX Report stated that the TSX should implement safeguards to minimize the risk that conflicts will affect the administration of listings regulation, as well as to address the perception that they could do so.
- 3.11. In its March 2010 report, the Standing Committee on Government Agencies recommended “that the [OSC] review the potential for conflict of interest between the regulatory and commercial functions of the Toronto Stock Exchange and that it take the steps necessary to address any problems identified.”<sup>22</sup>
- 3.12. FAIR Canada recommends that the OSC address within its Draft Statement “the perception that the TSX falls below international standards with respect to the separation of its regulatory and commercial activities”<sup>23</sup> and make it a priority to ensure that the TSX implements adequate safeguards. In our view, the OSC’s proposed recognition orders<sup>24</sup> relating to the Maple Group’s proposed acquisition of TMX Group do not adequately address the conflict of interest.
- 3.13. **Comprehensive Background Check** - FAIR Canada believes that there is a real need for a single, comprehensive search function that would allow investors to check the securities regulatory background of a potential advisor or investment firm. The current process of verifying that a potential advisor is registered is unnecessarily complex and confusing for retail investors. Even when consumers are aware that they should “check” the registration information of a firm or individual, the complexity of the regulatory regime and the fact that multiple sources must be consulted can make background checks, or even determining whether someone is registered or not, a difficult and confusing exercise for a retail investor. It is not practical to ask the average retail investor to navigate through the complexities of the current system to locate the basic information they need.
- 3.14. FAIR Canada recommends that Canadian securities regulators provide an informative, comprehensive, “one-stop” national system for investors to check registration and background

<sup>21</sup> Carson, John W., “Managing Conflicts of Interest in TSX Listed Company Regulation” (July 23, 2010), online: <<http://faircanada.ca/wp-content/uploads/2008/12/TSX-Listings-Conflicts-final-report-23-Jul1.pdf>>.

<sup>22</sup> *Supra*, note 1, at page 35.

<sup>23</sup> *Ibid.*

<sup>24</sup> (2012) 35 OSCB (Supp-2).

information (including proficiency and disciplinary history) and SRO membership for all firms registered with securities regulators and members of SROs, and to identify non-securities licenses for individuals licensed under different regimes with different sponsoring firms. This system should include plain language explanations of the information provided and be searchable under business names as well as proper legal names. **Additionally, we recommend that the system provide assistance to investors who do not have access to the internet and those who are not computer-savvy.** One phone number where a consumer can call to have the relevant information explained would be an important element of such a system.

- 3.15. **Advisor Incorporation** - FAIR Canada is concerned about initiatives underway in some provinces to permit financial advisors to incorporate. FAIR Canada considers incorporation to be incompatible with the fundamental nature of dealer and adviser regulation. We believe that it will weaken control and supervision of sales representatives by registered dealers and advisers. Allowing the incorporation of individual registrants in order to assist registrants to potentially reduce their tax liability will impede rather than help governmental and regulatory efforts to protect consumers, and will not further the objectives of securities regulation: to protect investors and foster fair and efficient capital markets. We are alarmed that provincial governments would prioritize such an initiative over others that could improve investor protection.
- 3.16. The fundamental issue is that the legal relationship that currently exists between the registered dealers/advisers and their individual registered representatives will not be preserved if those individual registrants are permitted to incorporate professional corporations. The current securities regulatory structure presumes the structure of an employer-employee or employee-agent relationship. In our view, incorporation will fundamentally undermine the legal foundation of such a relationship. FAIR Canada urges the OSC to oppose any efforts to permit the incorporation of individual registrants in Ontario.

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Feel free to contact Ermanno Pascutto at 416-214-3443 (ermanno.pascutto@faircanada.ca) or Ilana Singer at 416-214-3491 (ilana.singer@faircanada.ca).

Sincerely,



Canadian Foundation for Advancement of Investor Rights