

Via email

June 15 2014

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**INTRODUCTION OF PROPOSED PROSPECTUS EXEMPTIONS AND
PROPOSED REPORTS OF EXEMPT DISTRIBUTION IN ONTARIO**

Supplement to the OSC Bulletin

March 20, 2014 Volume 37, Issue 12 (Supp-3) (2014), 37 OSCB

http://www.osc.gov.on.ca/documents/en/Securities-Category4/csa_20140320_45-106_rfc-prospectus-exemptions.pdf

Commentary on proposed Equity Crowdfunding Exemption

I am a retired senior .When I heard about the Commission"s proposal to allow crowdfunding for vulnerable investors I felt compelled to write a letter. Older investors already face many challenges and threats so I do not understand why the OSC wants to add to the list.

I am driven to provide Comments on the OSC Consultation on proposed exemptions related to equity crowdfunding .I feel the Equity Crowdfunding exemption issue is especially critical for the older investor. It is a monumental event in securities law in that, for the first time, non-accredited investors including retirees will be allowed to purchase exempt securities outside even the minimal suitability standard. The evolution of social media has increased the likelihood of affinity fraud in cyberspace, where the potential reach and thus the potential harm is multiplied exponentially The increased publicity surrounding and popularity of private markets heightens investor protection concerns and create a natural magnet for non-accredited investors .I appreciate that the OSC has attempted to insert a number of investor protection provisions including individual and annual investing caps but no amount of protections can justify such an exemption.

I have spent considerable time reviewing the pros and cons of an exemption for crowdfunding for non- accredited retail investors outside a suitability standard. In the end I concluded that there was insufficient research / track record to support the OSC proposal. As well, there are a number of serious unanswered questions regarding

investor protection and legal/ administrative details. Accordingly , I cannot support the proposals as written . This does not mean that I am opposed in principle to using the internet for capital raising (I use a online discount broker) or that equity crowdfunding has no place in the regulatory system. Indeed, I feel that certain changes to the AI rules related to financial competency (rather than using just net worth or income) may expand the eligible investor base without compromising investor protection.

Caution is the order of the day given Ontario demographics. The OSC is employing a "wait and see " approach to a Best interests and embedded commissions regulation. It should do the same for crowdfunding. In the case of pre-sale delivery of a Prospectus the issue has been researched for over 15 years and still isn't implemented!

Executive Overview

The replacement of defined benefit plans with defined contribution plans, along with the shift of retirement assets from employer-supervised employee-benefit plans to broker-advised Individual Retirement Accounts, has required Ontarions to assume greater responsibility for their financial security in retirement. Permitting Crowdfunding will undoubtedly prompt aggressive marketing campaigns encouraging workers to rollover RRSP balances into loosely regulated crowdfunding " opportunities " Many will be retirees who are inappropriately treated as accredited investors not because they are either financially sophisticated or wealthy, but because they have accumulated a considerable nest egg that they must rely on for income throughout the remainder of their lives. The increased complexity of financial products and financial planning argues for strengthening advice regulation regardless of whether Crowdfunding activities are permitted yet the Best interests initiative remains a dream for over at least the last decade.

Investing in early stage companies requires business acumen and investment sophistication. Most retail investors however do not have the skills, experience or time to effect adequate due diligence. Regulators have realized this and created the exempt market. It has served Canadians relatively well. If this regulatory exemption is granted, I believe these "investments "will harm Main Street Ontarions , particularly seniors ,and will also sap contributions for retirement plans and saving for the education of their children. Further, although the Head Office must be in Canada, there is no assurance that jobs created , if any,will be based in Canada/Ontario. Indeed, there is no evidence that the number of jobs created is worth the risks ordinary people are being exposed to.

Retirees will likely be unfamiliar with key startup investing principles e.g. implied valuation, liquidation preferences, minority protections, information rights, tagalong provisions, first refusal rights, anti-liquidation, reverse vesting, to name just a few. Investor advocates fear that crowdfunding will push the least desirable and riskiest investments that cannot attract mainstream investor support out to the retail investor base, essentially passing on the riskiest slice of investments to those who can least afford the risk. This will set them up for failure at the outset regardless of whether or not the firm is successful.

Entrepreneurs that are unable to find funding from traditional sources will seek out small investors and retirees for support. Of course, there are many other threats, besides investment risk, with granting this exemption not to mention the distinct possibility of fraud .

More ideas get funded today than can possibly return capital, but with crowdfunding the percentage of successes markedly decreases. A lion's share of crowdfunded investments will never make money and investors will be out-of-luck. While small, fragmented investments may limit the catastrophic risk to any single investor, too many failures will give crowdfunding and its regulators a bad rap.

OSC survey produces mixed results and identifies risk areas that need to be addressed

An OSC- sponsored survey showed that roughly half of respondents are not willing to invest in SME or via crowdfunding. About one-sixth expressed strong interest in SME investing and crowdfunding. The remaining one-third were deemed potential investors. Roughly two-thirds of those willing to invest were concerned about potential for fraud and the Risk of losing their money. Roughly half of respondents cited additional reasons reflecting a concern with the lack of unbiased information and the lack of liquidity. Among the group with an interest in investing via crowdfunding, some 4 out of 10 would invest under \$1000, 2 out of 10 would invest \$1000-1999, 2 out of 10 would invest \$2000-4999, and the remaining just 17% would invest \$5000 or more.

While 52 % of survey respondents who would be crowdfunding investors seemed to understand the risk of investing in start ups is high, a whopping 43% deem it as medium risk. In addition, the responses also raised a concern that 12 % of investors who identified themselves as low risk are strongly interested in crowdfunding. Source: http://www.osc.gov.on.ca/documents/en/Securities-Category4/sn_20130828_45-712_progress-report-b-investor-survey-report.pdf While such surveys have a number of limitations, the data for what's worth, seems to suggest that the \$10,000 annual cap is at the extreme high end. The OSC should explain why such a high cap was chosen for the exemption or consider reducing it.

Warnings have limited value

Critics of equity crowdfunding believe the risks of start-up financing have been underplayed. While it is clear that more than half of start-ups fail in the early years, they argue that there is no evidence that the surviving businesses would themselves produce any return to early investors in practice. It will take years for some problems to be recognized and, given the infancy of the market, retail investors are at present unaware of the level of risk they are accepting. Multiple funding rounds could lead to increased complexity for investors seeking to manage their existing investment and avoid the dilution of shareholder value. Linked to this, there is a material risk that other shareholders may receive more rights (anti-dilution rights or better, alternative share classes). These risks need to be disclosed to retail investors in a clear, unambiguous plain language manner if equity crowdfunding is to be exempted from accredited investor criteria. The activity of warning is not enough, of course; the warning must also be read and understood (whether actually or constructively) to constitute a complete communication

In the case of mutual funds , regulatory warnings have been challenged . The CSA/OSC purports to help investors understand the limitations of past-performance data by

requiring fund ads touting historical returns to include a warning. It states that "past performance does not guarantee future results" and that investors could lose money in the fund being promoted. This raises the question of whether such a warning fulfils its intended role. Ahmed Taha and Molly Mercer, professors at Arizona State University, and Forest Law School professor Alan Palmiter conducted a study to find out.

Participants were each shown one version of a performance ad for an equity fund that had outperformed its peers in the past. After reading the ad, participants were asked about their propensity to invest in the fund and about their expectations regarding its future returns. Some participants viewed a version of the ad containing the SEC's warning message. Others were shown a version that was identical, except that it had no warning. They found that the mandated warning by regulators is completely ineffective. Participants who saw the ad with the warning were just as likely to invest in the fund, and had the same expectations regarding its future returns, as participants who saw the ad without the warning. The warning's ineffectiveness is not surprising, given its weak language. It only warns that high past returns do not guarantee high future returns and that investors in the fund could lose money. Virtually all investors knew this even before the 2008 financial crisis battered fund returns. Source: Worthless Warnings? Testing the Effectiveness of Disclaimers in Mutual Fund Advertisements by Molly Mercer, Alan R. Palmiter, Ahmed E. Taha :Source: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1647241 .

Many commentators, focusing on consumers' cognitive abilities, have concluded that consumers do not always read, understand, or respond to product warnings. This can result from a number of factors, including suboptimal presentation of the warning, information overload or other cognitive biases, deliberate decisions to disregard the information, lack of English literacy, age related issues (seniors issues as recently identified in a IIAC report) or exigent circumstances. It is therefore critical that the OSC behaviourally test the proposed warnings associated with crowdfunding for effectiveness.

Non-accredited investors could be adversely impacted by this Exemption

I have no issue with affluent sophisticated investors putting money into risky start-ups . Accredited investors are up to the task of taking on risky ventures . My concern is that marketing will be aimed to those who are easily influenced by tales of the *Next Big Thing* to people who don't realize just how long the odds are against such winners and who cannot absorb the losses. Just how low are the odds ? " OSC commissioner James Turner has been quoted as saying

"Ninety nine percent of startups won't succeed [Source : <http://read.thestar.com/?origref=https%3A%2F%2Fwww.google.ca%2F#!/article/52a54f0dcb00713c4a253620-let-s-protect-investors-from-risky-startups-roseman>] If this figure is correct , it leads to the conclusion that of every 100 Ontarions who invest, 99 will lose money disregarding a myriad of other risks such as the increased risk of fraud, dilution or other factors. How can this be good for Main Street or retirees living on fixed income?

I argue against the adoption of this exemption to established and proven rules that are designed to protect unsophisticated retail investors. To calibrate the \$10,000 annual investing cap figure, note that Canadians contribute an average of just \$3,500 annually to their RRSPs; according to Statistics Canada the total unused RRSP contribution amount is estimated to exceed a whopping \$1-trillion by 2018 .In Ontario, the average

earnings in 2013 amounted to roughly \$48,900 pre-tax a year; people in the retail trade made \$27,660 annually. The debt to income ratio is at record levels. Middle class Ontarions are struggling to make ends meet . Assuming the generic rule that speculative investments for the middle class/elderly should be in the range of 0-5 % of the portfolio , a \$2500 after- tax investment in a startup would mean that on average investable assets are \$50,000. At \$10,000 ,the proposed OSC annual cap, the figure soars to \$200,000.This seems very high to me.

If the accredited investor qualifications are relaxed now to allow lots more Ontarions, with less investment sophistication and much smaller incomes and loss capacity, to Equity crowdfund, I believe investors risks will dramatically rise. True, as a society we allow people to freely gamble at Government owned Ontario casinos if they want, despite the extremely low odds of winning. Here though, the Government motivation is based on the need for revenue .But permitting anyone to raise up to \$10,000 (after- tax money) annually from the public for untried ideas and untested managements is to abandon prudence and could lead to an increase in taxpayer funded social benefits, an adverse situation. Although imperfect, existing exempt market rules seem to us to have struck a not unreasonable balance. Even then , there have been some eye-popping scandals.

Good ideas combined with experienced teams are fundable But they should never be funded by naive small investors and who can lose their entire investment and end up with impaired financial health.

My primary concerns are as follows:

Fraud is a major concern for retail investors especially seniors

Equity crowdfunding is rooted in the internet .According to the CSA 2012 Investor Index http://www.investright.org/uploadedFiles/resources/studies_about_investors/2012%20CSA%20Investor%20Index_%20FINAL_EN.pdf over half of Canadians (56%) agree they are just as likely to be a victim of investment fraud as anyone else. Fraud is a serious issue in Canada and internet fraud tops the list.

The Ontario Securities Commission 2013 Enforcement report shows that fraud remains the biggest source of cases against individuals - illegal distributions were the top allegations for companies. It is in this environment that a number of commenters suggest internet-based equity crowdfunding will operate .I feel that this exemption places vulnerable retail investors in a dangerous situation unless better controls can be articulated.

<http://www.investmentexecutive.com/-/osc-launches-fewer-enforcement-cases-in-2013>

I therefore feel that Ontarions face enough fraud threats without adding to the list by allowing an exemption for Crowdfunding.

Moneylaundering poses a threat to equity crowdfunding investors

Crowdfunding is particularly susceptible to money laundering and other financial crimes. Private placements pose a money laundering risk because they are often used to generate illicit assets through market manipulation, insider trading and fraud. In addition, unlawfully acquired assets can be used to purchase securities with proceeds of crime in order to resell them and create the appearance of legitimately sourced funds. The combined effect of crowdfunded securities placed in offerings that are exempt from

registration and not subject to the filing review process of a registered offering, makes crowdfunding open to being used as a vehicle for money laundering and other financial crimes. <http://www.lexology.com/library/detail.aspx?g=1749dfe8-8946-466c-9fe2-a920e7f83118>

The U.S. SEC is proposing that crowdfunds satisfy the Anti-Money laundering [AML] Program Requirement by implementing and maintaining a written AML Program that includes, at a minimum: (1) policies, procedures and internal controls reasonably designed to achieve compliance with the Bank Secrecy Act [BSA]; (2) policies and procedures that can be reasonably expected to detect and cause the reporting of required transactions; (3) the designation of an AML compliance officer; (4) ongoing AML employee training; and (5) an independent test of the crowdfund's AML Program. (Source: <http://www.duhaimelaw.com/2013/11/08/sec-equity-crowdfunding-rules-first-to-include-anti-money-laundering-and-financial-crime-protections/>) The OSC should consider imposing similar requirements.

Concerns about Portals

The proposed Ontario crowdfunding rules provides that funding portals will need to be registered as an existing dealer or adviser category or in a restricted dealer or adviser category. This is a good decision. Portals will have obligations to identify issuer-specific risks and any conflicts of interest with deals posted to their site - similar to a registered Dealer-broker. The exemption proposal also requires that portals : (a) Act as gatekeeper to reduce the risk of fraud by conducting appropriate background and regulatory checks on directors, officers and significant shareholders of issuers; (b) Ensure all funds received in connection with the offering are held in escrow and only released to issuer if the minimum target amount of the offering or greater has been reached and investors have not exercised their 48 hour right of withdrawal to cancel their commitment;(I think a 5 day cooling off period would be more appropriate); (c) Ensure that no investor in a 12 month period has purchased securities offered under this exemption that, in the aggregate, from all issuers, exceeds \$10,000, or in any one issuer exceeds \$2,500 (not sure how this can be achieved); (d) protect privacy of information and (e) Not compensate promoters, finders, or lead generators for providing personal identifying information of personal investors .

I concur that a funding portal cannot offer investment advice or recommendations; Solicit purchases, sales or offers to buy securities offered or displayed on its website or portal; Compensate employees and others for such solicitation or based on the sale of securities; or Be related to businesses making offerings through them.

The precise OSC operating rules for funding portals are still to be determined so I cannot comment further.

The OSC is placing a high degree of reliance on portals to protect investors. I strongly recommend the OSC delay Ontario implementation and await the results from other jurisdictions .

In the interim, non - accredited Ontario investors would still have access to a number of high risk/ high return investment opportunities. These include but are not limited to IPO's, gold mines, exploration companies, exchange listed micro cap firms, small cap funds , SPAC's ,reverse and leveraged ETF's and of course labour- sponsored investment funds.

Self-Certification is not robust

The OSC requires investors to provide a self- certification as part of its investor protection toolkit. In view of the fact there is no suitability regime, that is about the best that can be done to at least create some acknowledgment of risk. Research has shown that retail investor overestimate their investment knowledge and risk tolerance. Their financial literacy is in fact alarmingly low as was demonstrated by the Task Force on Financial literacy and a host of other independent research. In the case of mutual fund investors, OSC testing has concluded that disclosure documents must be written at the Grade 6 literacy level in order to be understood. Based on what I've read I expect crowdfunding Offering documents and literature will not meet this low literacy standard.

As far as record keeping goes, I am not confident that all investors would comply with the \$10,000 annual cap –for instance the elderly may well be at risk if they sign these certifications while suffering from any number of afflictions that plague them so some controls are needed. Others are merely sloppy record keepers.

Nature of Equity Crowdfunding works against the un-accredited retail investor

The point retail crowdfunding investors will always be missing with the prevailing equity crowdfunding platforms is that investors cannot negotiate the companies' valuation and that makes a huge difference on potential financial returns. In the case of equity crowdfunding I see un-accredited retail investors having an “opportunity” to invest in startups that will provide the minimum of information and be under a minimum of regulatory oversight. In effect they will have high risk with little chance of return.

Even if a retail investor had the talent, resources and time to investigate the start ups they would be faced with the threat that successive rounds of financing will dilute the holding to almost NIL for the original small investor. There will also be issues of corporate governance, insider-trading and outright unethical misbehavior that will reduce the chance that the small retail investor will reap any benefits proportionate to the risk they have taken.

Given the remote odds of individual investor success it is apparent that potentially hundreds of millions of dollars potentially are at risk. I therefore recommend that, if Crowdfunding is to be, that maximum single investment and annual caps be reduced at least to the level revealed in the OSC's own survey.

The OSC needs to be resourced to regulate the crowdfunding exemption

In June 2013 the OSC released the results of a sweep of Exempt Market Dealers and PM's. http://www.osc.gov.on.ca/documents/en/Securities-Category3/sn_20130531_33-740_rpt-results-kyc-kyp.pdf

Staff found that the sweep revealed substantive compliance breaches by PMs and EMDs and noted that certain registrants' practices were unacceptable. If these types of breakdowns are occurring with EMD's after decades of operations, what can we expect from even less regulated portals? Crowdfunding portals, like Exempt Market Dealer's, have no SRO to provide oversight and enforcement. I am constructively critical that portals will fulfill their obligations robustly without oversight and that the OSC, will apply the necessary resources to diligently monitor the impact of this exemption

RECOMMENDATIONS

More research needed

- There is insufficient research or historical data to support the OSC proposals, It is important for the OSC to conduct further research regarding the potential benefits and risks for issuers and retail investors. This would be consistent with past prudent practices of the Commission that have been used in other reforms such as Best interests and pre-sale delivery of Fund Facts. What kind of investors will be attracted to crowdfunding and what is their vulnerability level? What is the risk of platform failure and the consequences? In particular, I would like to gain a deeper appreciation of how this exemption will benefit the Ontario economy and what are the main risks to retail investors, besides success of the business. This would include contractual risks, dilution risk, governance risks, fraud, portal failure etc. For investors to self- certify risk acknowledgment they need to know precisely what the risks are and some idea of their likelihood. I believe the CAC of the CFA Society made a good point in their AI and MA Exemption letter that the form does not elucidate what are the risks that the person is acknowledging:
http://www.osc.gov.on.ca/documents/en/Securities-Category4-Comments/com_20140508_45-106_litvinova.pdf

If the Ontario securities commission is unwilling or unable to effect such research or if the information to do such research is generally not available because of the short history of equity crowdfunding and still wishes to approve the proposed exemption, then I recommend the OSC consider the exemption as an experiment and organize itself accordingly. This would entail that the OSC commit to closely monitor the developments of the Canadian equity funding experience and to provide the appropriate enforcement resources to ensure compliance with the exemption. At the end of some specified period, say 12 or 18 months, the OSC staff would analyze the results and determine if changes to the legislation /rules are required. [Crowdfunding portals, like EMD's, have no SRO to provide oversight and enforcement. I remain constructively critical that portals will fulfill their obligations robustly without regulatory oversight; accordingly, I urge the OSC to apply the necessary incremental resources to diligently monitor all portals for compliance.]

- **Set marketing/advertising standards** To prevent deceptive or misleading advertising in these offerings, the Commission should require advertising to comply with certain standards unique to crowdfunding. If the Commission does not adopt any standards, unsophisticated or unscrupulous issuers will attempt to take advantage of investors with misleading and deceptive marketing material(s).
- **OSC information Guides should be available for retail investors to read before investing in equity crowdfunding.** I view a Guide, like the one *Investing in mutual Funds* , as an important component of an Equity crowdfunding investor protection regime .I recommend that it should be delivered with the Offering documentation along with the applicable complaint Guide.
- **Provide context on regulatory protection** The simplistic statement to the effect

that the investor will not have the benefit of certain protections under securities law would be enhanced to the extent that those specific protections were explicitly listed. Accordingly, I recommend that the retail investors' understanding of risk would be enriched if the regulatory protections foregone by not using a prospectus were explicitly listed in the risk statement for exempt securities and in the suggested Guide.

- **Require portals to prominently exhibit on their website that they are OSC registered dealers** This should be displayed on the HOME page of the portal.
- **Educational Materials are required** An intermediary/portal should be required to deliver (or make available) at account opening educational materials in plain language. The materials must discuss: the process for the offering; the risks associated with investing in the securities; the types of securities sold through the platform and the associated risks; restrictions on resale; the types of information that an issuer is required to provide in annual reports; the frequency of the delivery of that information; the limitations on the amount investors may invest; the circumstances under which an issuer may cancel an investment commitment; the limitation on the investor's right to cancel an investment commitment; the need for an investor to consider the appropriateness/suitability of an investment; and that there may be no ongoing relationship between the investor and the intermediary. The proposed rules do not require a specified format for the materials.

It is impracticable, of course, to require intermediaries watch over investors to confirm that they have read investor-education materials. However, it would be practicable to require investors to take a quiz that demonstrated that they had reviewed it, This quiz could be combined with the quiz that intermediaries are otherwise required to administer to confirm each investor's understanding of liquidity risk and the risk of investing in small businesses. Alternatively, the Commission could require that the retail investor scroll through a series of web pages that show only one or two short sentences in a large font setting forth the most important investor-education facts, with a button confirming that they have read them and a link to more information related to that web page.

- **Provide prominent warning** The WARNING header should be in a bold and prominent. See general comments on WARNINGS.
- **Reduce investor caps** In principle, a retired couple could invest up to \$20,000, p.a. not including any inadvertent over-contributions. This is way too high. The B.C. approach to Equity crowdfunding caps is interesting. The BCSC says it would limit issuers to raise no more than \$150,000 per offering and limit them to no more than two offers or up to \$300,000 per year — only a fifth as much as Ontario would allow. In addition, the B.C. commission would limit investors to \$1,500 per offering. The U.S. Jobs Act allows companies to raise up to \$1 million from small investors, with investors making less than \$100,000 able to invest **either \$2,000 or 5 percent of their income**, whichever is greater, and investors making more than \$100,000 able to invest 10 percent of their income. Offerings will be made to investors via online funding portals and broker dealers.]
- **Establish a cross-portal tracking system** The current approach limits investors

to \$10,000 p.a. but there is no way of enforcing this. A rule which cannot be enforced is not a rule at all and therefore offers no investor protection. There is a pressing need to ensure that investors do not exceed statutory investment limits by implementing standardized reporting and communication across platforms.

- **Tighten up self-certification** From bitter experience I believe the Self-certification needs some additional strengthening - a low key passive approach will be inadequate to raise sufficient consciousness of the risk being taken. I believe the plain language questions, as proposed by the Small Investor Protection Association in their Comment letter would do the job.
- **Provide a built-in alarm system** I believe that in order to assist investors to determine the appropriateness of any particular investment, as a minimum, it would be beneficial if an investor was required to specify on the risk acknowledgment form what percentage the investment represented as a percentage of the investor's net investable assets. While the specific percentage that may be appropriate for any particular investor will vary based on individual circumstances, requiring an investor to specifically address his/her financial position may help them determine whether additional scrutiny of the particular investment is warranted. At the very least, requiring investors to turn their minds to the size of the investment as a percentage of their net investable assets would raise their consciousness of the potential risk they are agreeing to accept. Unlike the OSC proposal, some other jurisdictions are mandating a certain percentage of income, net worth or other criteria before an investor can engage in equity crowdfunding.

Summary and Conclusion

A Cost-Benefit analysis (CBA) is really needed for such a wide-sweeping change in investor protection. With so much fraud and mis-selling already targeting unsophisticated investors in Canada, regulators have not adequately weighed the costs and benefits of crowdfunding. The question is how much loss and financial ruin are these provisions going to cause, and how does that compare to the benefit in terms of funding of new companies that this is likely to generate? A CBA will help set a sound foundation for regulatory policy and rules.

Although it is not specifically stated, I assume access to OBSI is available should a dispute arise. This is essential.

As a general note, I wish to stress the importance of harmonizing the prospectus exemptions across all Canadian regulatory jurisdictions, and would encourage all of the jurisdictions to minimize local amendments to the greatest extent practicable.

My recommendation is that the Crowdfunding Exemption not be approved at this time. In the event it is approved, I have provided a number of common sense Recommendations that I believe will minimize the damage to people's nest eggs. No stakeholder including the OSC, should want to read a headline that an elderly retired couple has suffered an irrecoverable loss due to this controversial exemption.

In any event, I recommend at least a two year Sunset clause added that would review the experience with this Exemption with a view to determining whether the Exemption should be killed, continue as is, or continue with modifications.

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Art Ross