UNIVERSITY OF TORONTO
FACULTY OF LAW

78 Queen's Park
Toronto, Ontario M5S 2C5

October 19, 2018

Dear Members of the Canadian Securities Administrators (CSA):

This letter is in response to the Notice and Request for Comments relating to the proposed Client-focused Reforms to (Supp-1). To be clear, the Notice and Request for Comments is a joint effort by all members of the Canadian Securities Administrators (CSA), which consists of regulators from all provinces and territories. After months of discussions, which included the consideration of empirical data, the CSA members finally agreed on the proposed reforms which include restricting certain commissions. Reaching agreement on harmonized reforms from all jurisdictions across the country is no small feat. The CSA members should be lauded for their efforts and the proposed reforms.

The approach that the CSA has taken is that certain reforms are necessary to protect investors' interests. This approach is sound. To the surprise of many, however, Ontario Minister of Finance Vic Fedeli expressed the government's disagreement with the rule, ignoring the statutory process for making laws relating to the capital markets in this province. The Minister's approach presents three problems. First, it undermines the rule-making process that is embodied in statute and has been the law for more than 20 years. Second, it fails to appreciate the important investor protection concerns that the CSA identified and sought to address. Third, it creates uncertainty in the capital markets, which the government of the day should be loath to do.

The process by which the Ontario Securities Commission (OSC) makes rules is precise. If the OSC wishes to make a rule in a prescribed area, it publishes the proposed rule and a notice, which invites interested parties to make written comments within a period of at least 90 days. A description of the anticipated costs and benefits must accompany the proposed rule. If the OSC proposes material changes to the rule, it must reissue it with the changes incorporated together with a statement of reasons for the changes. The public can make further written representations with respect to the changes during another comment period, which usually lasts for 60 days.

Once these periods have elapsed and the proposed rule is finalized, the OSC sends the rule to the Minister of Finance who may approve, reject or return the rule to the OSC for further

consideration. A rule rejected by the Minister does not come into force. This has been the law since 1994 with the implementation of the section 143 rule-making process. Consistent with the statutory process, Ministers of Finance do not typically weigh in with their views at the beginning of the notice and comment period. This explanation is necessary because it came as a grave surprise to hear Mr. Fedeli proclaim that the government does not agree with the proposed rule and that it will work with the other provinces and territories to develop an acceptable alternative.

In making this statement, Ontario's government placed itself in the shoes of the Ontario Securities Commission, the arm's-length regulatory body that has explicit statutory jurisdiction over the capital markets and in particular the protection of investors in this province. By inserting the provincial government into the policy-making process at this stage, Minister Fedeli undermined the CSA process also. All CSA members should be concerned.

The investor protection issues identified in the Client-focused Reforms are real and pressing. The CSA rightly classified embedded commissions as conflicts that must be either avoided or addressed in the best interest of the client. The proposed changes would result in the discontinuation of all forms of the deferred-sales charge (DSC) option, which is a back-end fee charged to mutual fund investors if they redeem their securities within a set period of time. Dealers would be required to negotiate sales commissions for mutual fund purchases upfront with clients and charge any commissions directly to them, enhancing transparency in the relationship. The reforms would eliminate a compensation conflict inherent in the DSC option that has given rise to investor protection concerns.

The Client-Focused Reforms are incredibly important from investors' perspective and were developed carefully after a review of a persuasive empirical study by Prof. Douglas Cumming and others. Their evidence showed that mutual fund dealers in the sample directed investors' money toward funds with higher trailer fees and that these fees were associated with worse performance, even before deducting the fees themselves. These conflicts of interest cause harm to Canadian investors – a harm that the CSA usefully sought to address.

The Minister's intervention benefits no one. His comments represent a step backwards for investor protection in this province in terms of both process and substance. Premier Doug Ford continually states that his government is "for the people." A government that is "for the people" would respect the policy-making process that is ensconced in legislation, avoid creating uncertainty in the capital markets and, most of all, seek to ensure that everyday investors are benefiting, not suffering, from current market practices.

Investors' interests are at stake here and I am therefore fully supportive of the CSA's efforts. In the interests of the rule of law, I sincerely hope that efforts are being made to ensure that the Province of Ontario respects the policy-making process embodied in the relevant legislation.

I would be more than pleased to speak with you if you have any questions regarding this letter. Please feel free to contact me at anita.anand@utoronto.ca.

Yours truly,

Anita Anand
JR Kimber Chair in Investor Protection and Corporate Governance
Faculty of Law
University of Toronto
84 Queen's Park
Toronto, ON
M5S2C5