

December 14, 2015

Expert Advisory Panel – FSCO/FST/DICO Mandate Reviews
Ministry of Finance
Financial Institutions Policy Branch (FIPB) & Income Security & Pension Policy Division
Frost Building North, Room 424
95 Grosvenor Street, 4th Floor
Toronto, ON
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Sent by email to: FIPBmandatereview@ontario.ca

Dear Sirs:

RE: FAIR Canada Comments on Preliminary Position Paper on the Review of Mandate of FSCO

FAIR Canada is pleased to provide comments to the Expert Advisory Panel regarding its observations and recommendations set out in its Preliminary Position Paper released November 4, 2015 (“Preliminary Position Paper”).

FAIR Canada is a national, charitable organization dedicated to putting investors first. As a voice for Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit www.faircanada.ca for more information.

I. General Overview

FAIR Canada supports the conclusion of the Expert Panel that a restructured regulator is necessary. We believe that in order to have Ontario’s financial services markets function well, Ontario needs a restructured regulator for the reason stated by the Expert Panel: “...to protect and enhance the integrity of its financial services marketplace...”, and also “to secure an appropriate level protection of consumers.” In order to create a modern, effective regulator for Ontario’s robust financial sector, the regulator must have a mandate and a structure that makes these two stated objectives central to everything it does.

Of critical importance to a modern, proactive regulator that can achieve a well-functioning financial services marketplace is ensuring that the regulator keeps the above-two objectives uppermost in mind to guide it in the course of its policy making, its identification of risks, its supervision, and its enforcement work. We therefore recommend that the entire organization, including each division (with its underlying business units) be guided by these objectives. The separate Office of the Consumer should be involved in consumer outreach and consumer literacy and education initiatives, and play an

important cross-sectoral role (insurance, pensions, pay day loans, consumer credit reporting agencies, mortgage brokers and lenders, etc) across the divisions in identifying and addressing consumer protection concerns.

Finally, and importantly, FAIR Canada urges the Expert Panel and the Ontario Minister of Finance to build into the modern regulator a sufficiently resourced, independent, statutory consumer advisory panel in order to improve the effectiveness of the newly configured regulator in meeting its consumer protection and financial market integrity objectives. This consumer advisory panel should be modeled on that of the United Kingdom's Financial Services Consumer Panel.

Currently, investors and consumers lack real involvement in the financial services policy-making process, especially with respect to the sectors that FSCO regulates. An independent, statutory advisory panel would bring useful advice to the new regulator from the consumer perspective and would challenge the newly configured regulator on meeting its objectives and duties. An advisory panel also could be active in bringing to the new regulator's attention issues likely to be of significance to investors and consumers (and therefore highly relevant to the regulator's mandate).¹

FAIR Canada agrees that there are material shortcomings in the mandates, regulatory approach, operational resources, tools and capacity of FSCO². Reform of these areas by a material restructuring of FSCO and the other agencies being reviewed is required in order to achieve the government's priority to have a modern and affordable financial system that protects investors and consumers and supports economic growth.³ We agree that the focus should first be on the mandate, governance and accountability requirements.⁴

II. FAIR Canada's Comments on Certain Recommendations

1. The Revised Mandate of the New Regulatory Agency

FAIR Canada completely supports the conclusion that the mandate or purposes of the new regulatory agency need to be rethought. We are of the view that the purposes of the new agency need to be: (i) to protect and enhance the integrity of its financial service marketplace (this would encompass the idea of a fair and efficient financial services marketplace that has effective competition in the interests of consumers) and (ii) an appropriate level of protection for consumers. As in securities regulation, the core of the mandate must be investor and consumer protection.

¹ See the Terms of Reference of the U.K.'s Financial Services Consumer Panel in its latest annual report, available online here: https://www.fs-cp.org.uk/sites/default/files/fscp_annual_report_2014-2015_final.pdf at page 44.

² Review of the Mandates of the Financial Services Commission of Ontario, Financial Services Tribunal, and the Deposit Insurance Corporation of Ontario: Preliminary Position Paper, (November 4, 2015), at page 5, available online at: <http://www.fin.gov.on.ca/en/consultations/fSCO-dico/mandate-review-november15.pdf>

³ Ontario Ministry of Finance "2014 Mandate Letter: Finance", (September 25, 2014), available online at <http://www.ontario.ca/page/2014-mandate-letter-finance>.

⁴ Preliminary Position Paper at page 8.

We reiterate our position that “a strong, vibrant and competitive financial services sector” should not be the express goal as this could conflict with appropriate consumer protection and an efficient marketplace. The dual mandate we set out above creates the framework which will result in a strong, vibrant financial services sector that has effective competition.

Market efficiency and the integrity of our financial services marketplace cannot be achieved without consumer confidence in the market; and consumer confidence can only be achieved when consumers feel they are treated fairly, and when consumers are adequately protected.

We agree with the Expert Panel’s overall conclusion set out in the Preliminary Position Paper as follows:

“In short, we think Ontario needs a restructured regulator to protect the integrity of its financial services marketplace amid rapid changes to industry structure, technology, market demands, and consumer expectations. This new regulator should have an expert Board of Directors, a new executive structure, an identifiable consumer protection orientation, adequate resources, greater agility and accountability.”

We agree that the mandate should be informed by the 10 principles in the OECD’s G20 High Level Principles on Financial Consumer Protection and that drafters should pay close attention to the need for policy and regulatory focus on financial consumer protection as set out in the Framework section of the OECD G20 High Level Principles document.⁵

2. Need For a Statutory, Consumer Advisory Panel and Investor Representation on the Board of Directors

As noted in the OECD’s G20 Principles document, “[i]n order to ensure effective and proportionate financial consumer protection regimes, it is important that all stakeholders participate in the policy making process.”⁶ Effective consumer engagement is essential for the new regulatory agency to succeed. That engagement is necessary in all areas that the agency will oversee. **FAIR Canada is of the view that in order to achieve the purposes set out in its mandate, the new regulatory structure needs to have (a) an independent, statutory consumer advisory panel; and (b) consumer representation in the revised governance framework, and in particular, consumer representation on its board of directors.**

⁵ OECD G20 High-Level Principles on Financial Consumer Protection (October 2011), at page 4, available online at: <http://www.oecd.org/daf/fin/financial-markets/48892010.pdf> “This renewed policy and regulatory focus on financial consumer protection results inter alia from the increased transfer of opportunities and risks to individuals and households in various segments of financial services, as well as the increased complexity of financial products and rapid technological change, all coming at a time when basic access to financial products and the level of financial literacy remain low in a number of jurisdictions. Rapid financial market development and innovation, unregulated or inadequately regulated and/or supervised financial service providers, and misaligned incentives for financial services providers can increase the risk that consumers face fraud, abuse and misconduct. In particular, low-income and less experienced consumers often face particular challenges in the market place.”

⁶ OECD G20 High Level Principles at page 4.

Consumers currently no have little to no engagement on financial services issues, especially in respect of the areas that the new financial agency is set to regulate. By contrast, industry associations and players have significant representation and influence.

FAIR Canada strongly supports provisions for an independent statutory consumer advisory panel that is appropriately funded and afforded a broad mandate to represent the interests of Canadian financial consumers for the area the new agency oversees. We have made and continue to make similar representations to governments and regulators regarding the cooperative capital markets regulator. The 2009 Expert Panel on Securities Regulation Final Report and Recommendations (“Expert Panel Report”) commented on the lack of engagement of retail investors in the securities regulatory process, and recommended the establishment of a national, statutory, independent investor panel. Such a panel was in the draft National Securities Act.

Regulators in the insurance sector struggle to obtain consumer input into the policy-making process; so such a panel would be an invaluable resource to the mandate of the new agency. In addition, the Standing Committee on Government Agencies, Report on Agencies, Boards and Commissions reviewing the Ontario Securities Commission, in 2010 recommended “that the Commission establish an investor advisory body, based on the financial services consumer panel in the United Kingdom.”⁷ And that “...the Ministry of Finance take the steps necessary to create an investor representative on the Commission’s board of directors.”⁸ The same should hold for the new agency.

3. Common and Consistent Standards and Regulatory Coordination

FAIR Canada supports the recommendation (#7) that the new agency should work and cooperate with other regulators that oversee the providers, sellers and intermediaries of financial products and services and coordinate regulatory actions to avoid regulatory overlap and arbitrage and to ensure consumer confidence in their dealings with these entities or individuals. We agree that there should be common and consistent standards for all financial services intermediaries and that there also should be disciplinary and enforcement consistency so that regulatory activity by one regulator is appropriately applied by another.

In particular, all financial service providers must be subject to an interprovincial licensing system and automatic reciprocal enforcement of disciplinary orders by all financial services regulators. Disciplinary action against an individual and/or a firm by any financial services regulator (in any province or territory) should automatically result in equivalent disciplinary action by all other financial services regulators against that individual and/or firm.

⁷ Legislative Assembly of Ontario, Standing Committee on Governance Agencies “Report on Agencies, Boards and Commissions: Ontario Securities Commission”, (March 2010), at page 25, available online at: http://www.ontla.on.ca/committee-proceedings/committee-reports/files_pdf/OSC%20Report%20English.pdf

⁸ Ibid at page 26.

We recommend that the G20 Principles on Financial Consumer Protection inform the standards and the supervisory framework of the new agency and other financial services regulators in Ontario. Ontarians deserve to be provided with advice that is objective and conflicts of interest need to be avoided.

FAIR Canada supports the implementation of a statutory best interests standard that would be applicable whenever financial advice is provided to consumers regardless of which sector of the financial industry the financial service provider operates in and what type of investment, if any, is recommended or sold to the consumer. We urge the Expert Panel to coordinate its work and findings with that of the Expert Panel on Financial Advisory and Financial Planning Alternatives.

We urge the Expert Panel to review our submission to the CSA on the feasibility and desirability of introducing a statutory best interest standard⁹ and our letter to the Expert Advisory Panel on financial advisory and financial planning.¹⁰ The need for a statutory best interest standard applies equally to the sectors that the new regulatory agency will regulate.

We believe that when devising the most appropriate regulatory framework, government and policy-makers need to avoid regulatory fragmentation to the greatest extent possible given the existing regulatory complexity that consumers must navigate and given the complexity for those who oversee the financial services sector.

4. Consumer Redress Process for Financial Consumers Needs Reform

FAIR Canada supports the recommendation (#23) that “[c]onsideration be given to an expanded mandate for [the agency] to include the establishment and oversight of a fraud compensation fund.” As noted in FAIR Canada’s recent Fraud Report¹¹, the primary objective of victims of investment fraud is, generally, to recover their losses; however, the rate of recovery of losses from investment fraud is low. Consumers’ avenues for redress are limited. Prevention is therefore essential to protecting consumers. However, when prevention fails and investors are harmed, there should be a mechanism to assist consumers who have been defrauded by a licensee or registrant in the financial services industry.

Other jurisdictions are doing more on behalf of investors and consumers to obtain compensation for them. Quebec has a compensation fund for fraudulent activity.¹² In the United Kingdom, there is a

⁹ See our letter to the CSA dated February *, 2013, available online at <http://faircanada.ca/submissions/csa-consultation-paper-33-403-statutory-best-interest-standard/>

¹⁰ Available online at <http://faircanada.ca/submissions/consultation-regarding-financial-advisory-and-financial-planning-policy-alternatives/>.

¹¹ FAIR Canada’s report “A Canadian Strategy to Combat Investment Fraud”, (August 2014), at p 3, online at: <http://faircanada.ca/wp-content/uploads/2014/08/FINAL-A-Canadian-Strategy-to-Combat-Investment-FraudAugust-2014-0810.pdf>.

¹² Quebec’s fund is called the Financial Services Compensation Fund (“FSCF”). Information on eligibility can be found on the Autorite des marches financiers website at <https://www.lautorite.qc.ca/en/submit-claimt.html> and a recent report issued by the AMF regarding a consultation held about the FSCF is available online at: http://www.lautorite.qc.ca/files/pdf/consultations/anterieures/indemnisation/resultatsconsultation_septembre_2013_an.pdf.

Financial Services Compensation Scheme as a last resort for consumers who have been the victims of fraud or mis-selling in the circumstance where the regulated entity is insolvent (in addition to having a financial ombudservice to address complaints).

The Quebec and UK models should be examined with a view to adopting such a compensation fund for consumers in the circumstances of fraud and other wrongdoing when the firm is insolvent. In order to foster confidence and trust by consumers in the financial services marketplace there must be effective enforcement to prevent fraud and other wrongdoing, and meaningful mechanisms to provide some compensation to consumers when they have been the victims of fraud and other wrongdoing.

Existing compensation funds appear to be inadequate. There are limits on CIPF and IPC coverage for consumers who are clients at IIROC dealer members or MFDA dealers (for example, CIPF coverage does not apply in circumstances of fraud¹³). The recent First Leaside case highlights the fact that investors thought that CIPF coverage would be available, but found it was not.¹⁴ FAIR Canada urges regulators and governments to broadly review compensation fund coverage in circumstances of insolvency, in circumstances of fraud, and in circumstances of other wrongdoing involving licensees and registrants so as to provide some level of coverage to consumers. We recommend the creation of a fund, with appropriate best practices in governance.

We agree that the fund's operation should take into account errors and omissions insurance or fidelity bond coverage that exists, and the fund should not cover those who deal with non-licensees or non-registrants. Essential to the fair operation of such a fund is public awareness about the significance of registration. This must be increased. A public education campaign is needed to emphasize the importance of dealing only with financial service providers who are registered or licensed and the importance of checking registration before investing or transacting with them. Correspondingly, a user-friendly, comprehensive system for checking registration must be made available to the public.

With respect to situations where disputes arise (and there is no insolvency), FAIR Canada recommends that the G20 High-Level Principles on Financial Consumer Protection, including Principle 9, Complaints Handling and Redress, needs to be adhered to. In particular, such a system should be "... accessible, affordable, independent, fair, accountable, timely and efficient. Such mechanisms should not impose unreasonable cost, delays or burdens on consumers."¹⁵

Currently, if consumers have a complaint about a segregated fund and also about other investments in their investment portfolio, they must take their segregated fund complaints to OLHI but their securities related complaints to OBSI. However, OLHI may not have the jurisdiction to handle the complaint since

¹³ Notice regarding CIPF Coverage dated September 22, 2015, available online at <http://www.cipf.ca/HomePage.aspx>.

¹⁴ See the appeal decisions of the CIPF Appeal Committees, available online at <http://www.cipf.ca/public/cipfcoverage/FirstLeasideSecuritiesIncr/Appealcommitteedecisions.aspx>. See also the following media article <http://www.investmentexecutive.com/-/contingency-fund-needed-to-cover-investors-losses-some-argue?redirect=%2Fsearch>.

¹⁵ OECD G20 High Level Principles, See Principle 7 on Financial Consumer Protection, at page 7.

only insurance companies, not managing general agencies or individual insurance agents, participate in OLHI. If the complaint relates to the insurance agent's (or "advisor's") activities, it will likely not fall within OLHI's mandate.¹⁶ Thus, individuals too often must deal with two different ombudsmen about complaints relating to advice given by a single "financial advisor" who is dual-licensed (as an insurance agent and registered to sell mutual funds and/or other securities) and sold them investment products some of which are securities and some of which are insurance-regulated products. This makes little sense, especially since OLHI's mandate has serious gaps in coverage which may result in consumers not being able to have part of their complaint resolved by any ombudsman.

In addition, we note that OBSI does not have the authority to issue binding decisions but only makes recommendations. We urge securities regulators and governments to empower OBSI with the ability to make binding decisions over all firms who participate in OBSI. In the UK, Australia and New Zealand, decisions are binding if the consumer accepts the recommendation. We see no reason for a less consumer friendly system in Canada.

The new regulatory agency should work with other regulators and ombudservices to provide a single point of entry for a financial consumer's complaint so that they do not have to navigate on their own through the regulatory labyrinth in order to have their concern addressed. The individual's complaint should be guided to the appropriate place for resolution by intake staff trained specifically for this purpose rather than the consumer being sent away to another place where their complaint may or may not be addressed.

5. Other Comments on the Structure of the Organization

FAIR Canada supports providing the new agency with the tools, structure and resources (both human and otherwise) needed to ensure there will be strong and effective oversight and enforcement. Given the different sectors that will have distinct divisions and business units, compliance departments in each division should have a strong interface with those responsible for enforcement.

FAIR Canada notes that there appear to be a number of frauds involving mortgage brokers offering securities-like investments in syndicated mortgages and related investments allegedly tied to charges on real property or otherwise. Given the increase in the amount of fraud that appears to be occurring in this space, we recommend that the Ontario Securities Commission be given the resources to pursue these types of frauds until the new agency has been reconfigured and has the expertise to do so.

To ensure effective enforcement, transparency and accountability mechanisms need to be built into the system. The new agency should track and make public data on consumer complaints (such as fraud complaints), the number of investigations from those complaints and the number of proceedings commenced and concluded.

¹⁶ See the second (and recent) independent review of OLHI which discusses this serious gap in redress for consumers using OLHI at Robert Wells, "Independent Review Report" prepared for OmbudService for Life & Health Insurance, available online at <http://www.olhi.ca/downloads/pdf/Independent%20-eview-Report-OLHI.pdf>.

FAIR Canada recommends that the new agency consider the adoption of a whistleblower policy with provisions respecting confidentiality, anti-retaliation and financial compensation. These three components are necessary to the success of a whistleblower program. FAIR Canada believes that such provisions are needed in order to address, as much as possible, the severe repercussions whistleblowers face when they come forward. Those repercussions negatively impact their careers, their reputations, their financial well-being, their health and their family relationships. In consideration of this fact, it is not sufficient to expect individuals to simply “do the right thing”.

We refer the Expert Panel to our submission to the Ontario Securities Commission on their proposed whistleblower program¹⁷ for FAIR Canada’s recommendations in this regard. Emphasis should be placed on transparency as to the number and types of complaints it receives, the number of whistleblower tips it obtains, the number of investigations it pursues and the number of enforcement outcomes it obtains (with and without financial payments). Structures that put an emphasis on meaningful disclosure and transparency of the enforcement process should lead to better accountability, both of the whistleblower program and enforcement generally.

In conclusion, FAIR Canada reiterates what it believes is urgently needed:

- (i) A regulatory regime that oversees whether the products being sold to consumers meet their needs and are in their best interests;**
- (ii) Consistent treatment of consumers across the regulatory spectrum;**
- (iii) An adequately funded and informed consumer voice that is part of the policy-making process; and**
- (iv) A statutory best interest standard applicable whenever financial advice is provided to consumers.**

We hope that our comments are helpful to the Panel’s work and would be happy to answer any further questions the Panel may have. Please contact Neil Gross at 416-214-3408 (neil.gross@faircanada.ca) or Marian Passmore at 416-214-3441 (marian.passmore@faircanada.ca).

Sincerely,



Canadian Foundation for Advancement of Investor Rights

Cc: George Cooke
James Daw
Lawrence Ritchie

¹⁷ FAIR Canada’s Comment letter to the Ontario Securities Commission regarding OSC Staff Consultation Paper 15-401: Proposed Framework for an OSC Whistleblower Program, (May 4, 2015), available online at <http://faircanada.ca/wp-content/uploads/2011/01/150501-Final-Whistleblower-Program-Submission-May-1-signed.pdf>.