FAIR | Canadian Foundation *for* Advancement *of* Investor Rights

December 23, 2015

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Dear Honourable Ministers:

RE: The Cooperative Capital Markets Regulatory System – Revised Consultation Draft of Provincial/Territorial Capital Markets Act and Draft Initial Regulations

FAIR Canada is pleased to offer comments on the revised draft provincial/territorial *Capital Markets Act* ("CMA") and the draft initial regulations for the Capital Markets Regulatory Authority.

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

I. Introduction

FAIR Canada supports efforts made by governments and regulators to improve and enhance cooperation with respect to securities regulation and capital markets in Canada. In so doing, the primary goal of securities regulation, that of protection of the investor[1], must be the key concern. Other goals of securities regulation, that of capital market efficiency and ensuring public confidence in the system, are important but should not be achieved at the expense of the primary goal if the capital markets regulatory system is to be enhanced from what we have now.

FAIR Canada urges regulators and governments to approach any harmonization efforts with the goal of furthering the key mandate of investor protection; and we also urge regulators not to engage in a harmonization process at the expense of adequate investor protection.

FAIR Canada encourages both current and future governments and regulators to incorporate the following investor protection measures as essential components of any cooperative regulatory scheme:

- a statutory best interest standard;
- an independent, statutory investor advisory panel;
- investor representation on the board of directors;
- a mandatory, statutory, independent, binding dispute resolution service; and
- effective structures, tools and resources to adequately combat investment fraud; and other wrongdoing.

FAIR Canada urges governments and regulators not to lose focus on several important investor protection initiatives that are currently underway. In particular, FAIR Canada encourages continued regulatory concentration on the mutual fund fees initiative (including the banning of third-party embedded commissions), and the implementation of a statutory best interest standard. Work to build the cooperative capital markets system should not be allowed to de-prioritize these important initiatives. Further delay in implementing these much-needed reforms entails significant cost to the investing public, and is not in the public interest.

Investor Protection Measures That Need to be Included in Any Framework

1. Statutory Best interest Standard

FAIR Canada is of the view that the CMRA should have as one of its first priorities the implementation of a statutory best interest standard, as this would be a key reform which would significantly improve investor protection and confidence of investors in our capital markets.

We disagree with the comment made in the September 2014 Consultation Draft Summary of Comments Received and Ministerial/Regulatory Responses ("Summary of Comments Received") that

[1] Pezim v. BC (Superintendent of Brokers), [1994] 2 SCR 557 at para 59 (SCC).

"Adoption of a best interest standard is outside the scope of this project, but within the CMRA's regulation-making authority."[2] Given the primary goal of securities legislation, the purposes set out in the provincial/territorial CMA, and the purposes set out in the Memorandum of Agreement ("MOA") dated July 23, 2015, adoption of this standard could be a central *raison d'etre* for the cooperative capital markets regulatory system ("CCMR").

The 2014 Consultation Draft Summary of Comments goes on to state: "We have revised section 55 to clarify this regulation-making authority."[3] Section 55 of the CMA now reads "A registrant must deal fairly, honestly and in good faith with its client and meet such other standards as may be prescribed." FAIR Canada would have preferred the immediate implementation of language explicitly raising the standard to one of acting in the best interest of the client. Nonetheless, section 55 now gives the CMRA clear regulation-making authority to specify standards which would implement a fiduciary or statutory best interest standard. FAIR Canada urges the CMRA to address, as one of its first priorities, the implementation of a statutory best interest standard and the implementation of regulations that align the interests of firms and their advisors with that of their clients.

IOSCO's recent Risk Outlook Survey[4] cited harmful conduct by registrants and other capital market participants as the top risk in the area of investor protection, with survey respondents reporting that "...harmful behaviour by capital market participants damages the proper function of the capital market, inflicts harm on the investing public and decreases the public's confidence in capital markets. Disclosure and suitability issues also ranked high amongst respondent's answers especially in the area of retail products."[5] A statutory best interest standard would reduce the identified market risks in the area of investor protection.

As noted in our 2013 submission to the Canadian Securities Administrators ("CSA") on the desirability and feasibility of implementing a statutory best interest standard[6], current securities regulation is inadequate. The current Canadian securities regulatory regime as it pertains to advice for retail investors is inefficient and does not facilitate healthy competition. It does not:

- require the avoidance of, or the appropriate management of, actual or potential conflicts of interest and therefore presents potential agency costs (i.e. investors need to expend resources to ensure their advisor is acting in their best interest, but have been demonstrated to not do so);
- align advisors' interests with those of their clients;
- facilitate informed consumer choice;
- require clear disclosure that firms and advisors are not bound by a fiduciary or best interest standard and should not be relied upon to act according to that standard, and the absence of this requirement creates or contributes to an expectations gap between consumers' expectations and financial service providers' legal obligations;

[2] At page 29; available online at http://ccmr-ocrmc.ca/wp-content/uploads/2015-10-13-CMA-Comments-Chart.pdf.
[3] At page 29.
[4] Available online at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD516.pdf.
[5] IOSCO's "A Survey of Securities Market Risk Trends 2015: Methodology and detailed results, December 2015, available online at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD516.pdf at page 4.
[6] Available online at http://faircanada.ca/submissions/csa-consultation-paper-33-403-statutory-best-interest-standard/.

- require the clear presentation of the costs of investing to consumers prior to purchase,[7] including being able to determine the costs of advisory services up-front;
- explicitly require advisors to take costs into consideration in making an investment recommendation;
- regulate titles and credentials to ensure that they are meaningful and allow consumers to differentiate between various financial service providers and the different advice parameters available.

In addition, we pointed out how the current regulatory system allows many practices harmful to consumers. The current Canadian securities regulatory regime:

- allows marketing and advertising materials to describe the services as being in the best interest of the client and induces the client to repose trust in the mistaken belief that the firm and the advisor will provide services in the client's best interest;
- allows fees to be embedded in the cost of the product and permits fee structures that are opaque, complex and difficult for consumers to understand;
- allows fees to be used by product manufacturers to incent financial service providers to sell higher-cost products that pay them higher commissions. This increases the fund's assets under management which increases the management fees payable. This creates a conflict of interest between the fund manufacturer and the fund's investors, since the mutual fund manufacturer rather than the fund or its investors is the primary beneficiary of the fund's asset growth;[8]
- undermines healthy competition, because product manufacturers compete for advisors' business, rather than investors';
- does not explicitly require the financial service provider to consider the cost of a financial product when determining what is suitable for the client;
- allows "advisors" to recommend leverage (or borrowing to invest) in order to increase assets under management, which inappropriately increases risk for most investors; and
- more generally, undermines effective price competition.

The implementation of a statutory best interest standard for dealers and advisers is urgently needed and would result in:

- increased protection for consumers;
- better financial outcomes for consumers[9];
- more effective competition;
- an increase in the level of professionalism in the financial services industry; and
- an increase in the level of trust in the financial services market.

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[7] FAIR Canada believes this to be a current expectation, but given that investors have difficulty accessing such information in lengthy, legalistic disclosure documents and given also that investor surveys demonstrate a very low awareness of costs, we do not believe the current system could be said to require clear information with respect to costs prior to purchase. We recognize that initiatives such as Point of Sale and CRM are underway and will eventually provide better cost information to consumers.

[8] (2012) 35 OSCB 11233 at page 11254.

[9] We note here that Professor Cummings Report on mutual fund fees which found shows that trailing commissions do have an impact on investment in mutual funds, and it's an impact that harms investors. The report is available online at http://www.osc.gov.on.ca/documents/en/Securities-Category5/rp_20151022_81-407_dissection-mutual-fund-fees.pdf. See also our commentary on the report, available online at http://faircanada.ca/whats-new/report-to-csa-indicates-trailing-commissions-impact-fund-sales-to-the-detriment-of-investors/.

Thus, the implementation of a statutory best interest standard should be done as part of the initial legislative design; but if it is not, it needs to be one of the first priorities of the new CMRA.

2. Independent Statutory Investor Advisory Panel

The Commentary entitled "The Capital Markets Act – A Revised Consultation Draft"[10], provides that governments of each participating province and territory ("CMR jurisdictions") "…will continue to discuss the possibility of establishing an investor advisory panel by legislation and will seek advice from the CMRA Board on this matter once the Board is established. This will allow the Board to provide input on the design of a model for the panel to ensure that it functions effectively and is responsive to the concerns and interests of investors. If a decision is made to move forward with a panel on a legislative basis, a provision may be included in the legislation establishing the CMRA." [11]

FAIR Canada is pleased that the CMR jurisdictions are discussing the establishment of a statutory investor advisory panel. To be properly structured with an appropriate level of independence, the investor advisory panel should not serve merely at the pleasure of the CMA board of directors. It should be created by a legislative provision, though details of its mandate, specific structure, funding and reporting mechanisms could be established by Terms of Reference established thereafter.

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 regulatory process, and recommended the establishment of a national, statutory, independent investor panel.[12] The draft Canadian Securities Act incorporated the 2009 Expert Panel's recommendations into its draft legislation at Section 51.[13] FAIR Canada fully supports this approach and recommends that the panel be modeled on the UK's highly-regarded statutory Financial Services Consumer Panel (the "UK Panel").

The importance of such a panel to the development of regulatory policy fostering fair and efficient capital markets and adequate investor protection cannot be overstated. Such a panel would provide an effective, transparent and credible mechanism for investor consultation and feedback. The UK Panel and the Ontario Securities Commission's Investor Advisory Panel have had a significant, positive influence on the regulatory policy-making process which has greatly assisted those regulators in fulfilling their statutory mandates. We encourage the statutory inclusion of such a panel within the CMRA and also within other securities regulators not participating in the CMRA. It should be afforded a broad mandate to represent the interests of Canadian consumers in securities regulation and should be given sufficient funding for this task.

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[10] Available online at http://ccmr-ocrmc.ca/wp-content/uploads/cma-commentary-en.pdf, at page 19.

[11] http://ccmr-ocrmc.ca/wp-content/uploads/cma-commentary-en.pdf at page 19.

[12] This was a recommendation set forward in the Hockin Report (Thomas Hockin *et al*., "Expert Panel on Securities Regulation Final Report and Recommendations" (June 2009), online: <http://www.expertpanel.ca/eng/documents/Expert_Panel_Final_Report_And_Recommendations.pdf >).

[13] Section 51 of the Proposed Canadian Securities Act provided as follows:
Section 51 (1) The Authority must establish an investor advisory panel, consisting of persons with knowledge of and experience with issues relevant to investors in securities.
(2) The panel's mandate is to represent the interests of investors by advising the Chief Regulator with respect to the Authority's regulations, policies and practices.
(3) The Chief Regulator must consider and provide a written response to any written recommendation of the panel.
(4) The panel must provide the Authority with an annual report of its activities within three months after the end of the Authority's fiscal year." Available online at http://www.fin.gc.ca/drleg-apl/csa-lvm.pdf.

3. Investor Representation on the Board of Directors

FAIR Canada reiterates its recommendation that the board of directors of the CMRA include directors who will represent the interests of retail investors. We understand that the Nominating Committee has been formed and that the work to appoint the directors is underway.[14]

One of the key criteria to be considered by the Nominating Committee should be experience in investor-related issues, given the purpose of the cooperative system to "provide increased protection for investors"[15]. The Nominating Committee should actively seek out individuals who have securities regulatory experience from the retail investor perspective. Such nominees should also satisfy other necessary criteria (namely, members who are independent of the governments represented by the Council of Ministers and possess appropriate qualifications and capital markets-related experience[16]). The appointment of qualified people whose body of work is known to reflect and foster the interests of retail investors would be in the public interest. There should be at least two such individuals appointed to the Board of Directors of the CMRA.

4. Mandatory, Statutory, Independent, Not-for-Profit, Binding Dispute Resolution Service

The Summary of Comments Received indicates that"[t]hree commenters recommended that governments and regulators mandate participation by all securities registrants in a single, independent, not-for-profit investment dispute resolution service that has the power to make binding decisions."[17] In response, it provides: "We thank the commenters for their comments. The regime under the CMA is consistent with current securities legislation."[18]

FAIR Canada considers this response completely inadequate for a question that urgently needs addressing in order to provide adequate protection to investors and consumers, and in order to foster confidence in our capital markets. It also needs addressing to meet Canada's international obligations under our G20 commitments. Improving the complaint handling process in Canada (by ensuring that the CMRA has an effective financial ombudsman that meets our G20 obligations) will benefit investors, financial services consumers and businesses, and it will improve confidence in and soundness of our financial marketplace. The proposed cooperative capital markets regulatory system purposes reflect, and should reflect, higher aims than the status quo.

Even if securities regulation traditionally has not concerned itself with the ability of investors to get redress, this is not the situation today. As acknowledged in the G20 High Level Principles on Financial Consumer Protection(the "G20 High Level Principles"), which were endorsed by the G20 Finance Ministers, including Canada's Finance Minister, at their meeting on October 14-15, 2011:"[c]onsumer confidence and trust in a well-functioning market for financial services promotes financial stability, growth, efficiency and innovation over the long term."[19]It is generally recognized that key components of consumer confidence are accessible and user-friendly arrangements to resolve

[14] Commentary, available online at http://ccmr-ocrmc.ca/wp-content/uploads/cma-commentary-en.pdf at page 21.
[15] See Section 1(a)(ii) of the MOA.
[16] See Section 6.2 of the MOA.
[17] Summary of Comments Received at page 65.
[18] Summary of Comments Received at page 65.
[19] G20 High Level Principles on Consumer Financial Protection, Framework at page 4.

disputes.[20] The inclusion of adequate dispute resolution services for consumers and businesses in the CMRA is to put into place an essential component of an adequately designed regulatory system. The G20 High-Level Principles were formulated as a result of the 2008 global financial crisis and in recognition of the need for better financial consumer protection in light of "recent and more structural developments". Such developments include the increased transfer of opportunities and risks to individuals and households; increased complexity of financial products; and rapid technological change at a time when financial literacy remains low and financial service providers may not be adequately supervised and are subject to misaligned incentives which increases the risk that consumers face fraud, abuse and misconduct.[21] The cooperative capital markets regulatory system should not ignore its obligations and should align itself with its international obligations and best practices rather than simply line up with "current securities legislation."

In 2009 the Canadian Federal Ministry of Finance convened an expert panel (the "Expert Panel") to provide advice and recommendations on a variety of issues related to Canadian securities regulation. In its *Final Report and Recommendations* released January 2009 (the "Report"), the Expert Panel said: "[w]e recommend the establishment of a dedicated service to address the lack of information, guidance, and support for investors in the domain of complaint-handling and redress. We envision that this service would disseminate comprehensive information about complaint-handling and redress in Canada. The service could be provided by a securities regulator or another existing regulatory entity." [22] Having an independent, not-for-profit, statutory, ombudservice with binding decision-making as part of the CMRA would follow from the Expert Panel's recommendation.

We believe that "accessible, affordable, independent, fair, accountable, timely, and efficient"[23] independent resolution of investment disputes is an essential element of consumer protection and we encourage governments and regulators to provide such a system for investors to resolve their complaints. Retail investors and consumers need a dispute resolution provider that will help them understand the process and their individual complaint, and they need a process that does not necessitate the expense of hiring a lawyer or other representative to seek redress. In addition, they need a dispute resolution process that will actually deliver a resolution of each dispute, as is the case in other leading jurisdictions[24]. The formation of the CMRA provides an opportunity to legislate the mandatory participation of all dealers and advisers in a single, statutory, not-for-profit, dispute resolution service with power to make binding decisions. Doing so would be in furtherance of the

[20] See World Bank Report issued January 2012 "Resolving disputes between consumers and financial businesses: Fundamentals for a financial ombudsman" at page 9.
[21] G20 High Level Principles, at page 4.
[22] The Report is available online at: http://www.expertpanel.ca/eng/documents/Expert_Panel_Final_Report_And_Recommendations.pdf. Professor Puri was appointed as one of two research directors for the Expert Panel.
[23] See G20 Ligh Level Principle 9.
[24] In the UK, Australia and New Zealand, the system provides for binding decision-making. We see no reason for a less consumer-friendly dispute resolution system in Canada. The European Union also has issued a Directive on alternative dispute resolution for consumer disputes, available online at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF and https://www.esma.europa.eu/investor-corner/file-complaint. See also the CFA Institute recent paper, "Redress in Retail Investment Markets: international Perspectives and Best Practices", January 2015, available online at http://www.cfapubs.org/doi/pdf/10.2469/ccb.v2014.n8.1. For recent work done in the UK regarding consumer complaints, see the Financial Conduct Authority's Policy Statement 15/19, available here: https://www.fca.org.uk/news/ps15-19-improving-complaints-handling and https://www.fca.org.uk/static/documents/thematic-reviews/tr14-18.pdf.

G20 High Level Principle 9, the principles set out in the MOA, and in furtherance of the mandate of securities regulation.

5. Investment Products that are a Security

FAIR Canada supports a definition of "security" in the proposed CMA that would allow the CMRA to regulate deposit and insurance based investment products, such as principal protected notes and segregated funds. Such products are generally caught by the definition of security but have been defined out of the term "security", even though the average retail investor likely views such products the same way they view securities – simply as "investments".

FAIR Canada disagrees with the proposed approach to be taken, which will require more stringent governmental approvals for the CMRA to enact regulations covering segregated funds. It appears this decision was reached as a result of comments received from some insurance industry players such as the CLHIA[25], which argued that segregated funds are already subject to a robust regulatory framework (a point with which we strongly disagree) and that an additional layer of securities regulation would create duplicative regulation and increase compliance costs (to which we also disagree).

FAIR Canada is of the view that the market conduct regulation of segregated funds is inadequate. While it may be in the immediate financial interests of the insurance industry to keep these complex products from being subject to adequate regulation in the interest of consumers, we believe the formation of the CMRA provides a key opportunity to address the issue of a lower standard being applied to the sale of segregated funds as compared to investments that are "securities". If the sale of such products were regulated by the CMRA, it would permit a consistent standard to be applied to the firms and individuals who recommend such products, including the disclosure rules on their sale and the know-your-product and suitability process (or, preferably, the statutory best interest standard) that must be carried out before they can be recommended.

Such regulation at a consistent level would make complete sense since frequently these differing investment products are sold by the same "financial advisor" and/or the same entity, often through its bank or insurance affiliated arm. This would also address the serious issue of regulatory arbitrage where financial service providers who do not want to meet the standard of disclosure and other regulatory requirements on the securities side, sell segregated funds (which are generally higher cost) to consumers instead. We have written about the inadequate regulation of market conduct regulation over segregated funds and refer you to those letters.[26]

This would not be duplicative regulation but would stand in place of the insurance regulations (or guidance created by the industry) for these investments. It would simplify oversight by firms and regulators of financial service providers who sell segregated funds (and other "investments"). It

[25] http://ccmr-ocrmc.ca/wp-content/uploads/com_20141119_draft-legislation_canadian-life-and-health-insurance-association.pdf. See also the comments from Advocis, available at http://ccmr-ocrmc.ca/wp-content/uploads/com_20141208_draft-legislation_advocis.pdf.

[26] See FAIR Canada's letters to FSCO on their draft Statement of Priorities: http://faircanada.ca/wp-content/uploads/2011/06/110606-FSCO-Draft-Statement-of-Priorities.pdf and http://faircanada.ca/submissions/osc-draft-2012-2013-statement-of-priorities/ and our letter to the Expert Panel regarding Reviewing the Mandate of FSCO, where we address the inadequate regulation of segregated funds: http://faircanada.ca/wp-content/uploads/2011/01/150821-Letter-to-Expert-Advisory-Panel-re-FSCO-Mandate-Review_Final.pdf which includes two letters written to FSCO about the inadequacy of the regulation of segregated funds.

should result in less regulatory duplication and complexity as there will be one set of standards (i.e. regulations) rather than two.

We oppose having the regulation of segregated funds and other "investments" depend on a governmental decision requiring 50% of all members of the Council of Ministers and the members of the Council of Ministers from each Major Capital Markets Jurisdiction, as this will likely delay any such reform and may subject it to criteria that differ from the stated Purposes of the CMA or the MOA.

However, if, nonetheless, the regulation of segregated funds and other products that are commonly understood as "investments" is subject to section 202(2) of the CMA, we trust that the policy-making process will be open, transparent and fulsome. In particular, a consultation process with all stakeholders, and most importantly, consumers and consumer-focused organizations, should be required.

6. Combating Financial Fraud

It is essential that securities regulators have the necessary responsibilities and tools to combat investment fraud. In our view, a more coordinated regulatory system will be better positioned to improve investor protection than the current system. What is needed is a coordinated approach amongst agencies, regulators and police so that there is effective prevention, deterrence, detection and enforcement against investment fraud, whether it is securities-related, mortgage broker-related, or insurance-related.

With respect to the CMRA, it is essential to ensure that Canada-wide enforcement of securities-related fraudulent conduct and other wrongdoing is strengthened, through appropriate staffing (including leading securities litigators, forensic financial professionals, investigators, and others) and prioritization based on complaints and market trends.

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

At present, there is also no central collection and clearing agency to coordinate efforts to combat fraud. To this end, FAIR Canada recommends that the CMRA, other securities regulators and self regulatory organizations (the Investment Industry Regulatory Organization of Canada ("IIROC") and the Mutual Fund Dealers Association of Canada ("MFDA")) along with other regulators, should collect, maintain and make publicly available data on fraud complaints, investigations, proceedings and subsequent outcomes, and should coordinate their efforts to the greatest extent possible and practicable. Having empirical data will allow for the prioritization of efforts and the optimal allocation of resources to combat fraud and other wrongdoing based on complaints and market trends.

FAIR Canada made a number of recommendations to improve Canada's ability to combat investment fraud in its recent report. We urge governments and securities regulators to give serious consideration to those recommendations.[27]

7. Enforcement Provisions – Whistleblower/Anti-Retaliation Provisions

We commented on certain enforcement provisions in our previous submission and support the legislation provisions in Part 9, "Market Conduct", of the CMA, that we referred to. We note that the revised draft CMA is making revisions to whistleblower provisions. We support changes which would:

- Provide that anti-reprisal protections apply to an employee who "reasonably" believes that their employer or a director, officer or employee of the employer, acted contrary to capital markets law (this should include regulations, regulatory guidance and the like);

- Provide that internal reporting (i.e. up the ladder disclosure) is also protected but not required prior to disclosure to the Authority, law enforcement agency or a recognized self-regulatory organization ("SRO"); and

- Broaden the whistleblower provision so that a report can now also be made to a SRO, and may be made with respect to a potential violation of the SRO's by-laws, regulatory instruments or policies.

FAIR Canada views the whistleblower provisions set out in the CMA as a step in the right direction. FAIR Canada recommends that the CMRA adopt 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".

For details on FAIR Canada's recommendations for a whistleblower program, please see our submission to the Ontario Securities Commission on their proposed whistleblower program[28].

Emphasis should be placed on transparency as to the number and types of complaints the CMRA 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.

With respect to section 77(1) of the CMA, FAIR Canada believes it should be amended for two reasons.

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[27] FAIR Canada's "A Report on a Canadian Strategy to Combat Investment Fraud", August 2014, available online at http://faircanada.ca/wp-content/uploads/2014/08/FINAL-A-Canadian-Strategy-to-Combat-Investment-Fraud-August-2014-0810.pdf.

[28] 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.

First, so that employees are provided with anti-retaliatory protection when providing information that the employee reasonably believes is contrary to capital markets law respecting an act of the employer or director, officer or employee of the employer *that has occurred, is ongoing, or is about to occur (italics indicate language to be added)*.

Secondly, we are aware that whistleblowers are often not only employees (of the dealer or issuer) but also independent contractors or agents. All persons should be able to benefit from anti-retaliation protections and not simply employees. Therefore, the anti-retaliation protection should apply to any whistleblower, with the regulator having the power to bring proceedings against a firm or issuer that retaliates against the whistleblower. Retaliation can occur against non-employees in the form of allegations of wrongdoing made against the whistleblower, including the institution of legal proceedings, the withholding of monies rightfully owed to the whistleblower and other unacceptable practices and behaviours.

FAIR Canada believes that the CMA should have a confidentiality provision which provides that whistleblower-identifying information is expressly exempted from the provisions of the relevant provincial freedom of information statutes and regulations. A whistleblower's identify should not be revealed as a result of a freedom of information request. This would be consistent with the approach taken by the Securities and Exchange Commission's whistleblower legislative provisions.

Section 77(2) should also be revised so as to be broader – including confidentiality agreements, policies and procedures, or codes of conduct of the entity, employment agreements (whether written or not), severance agreements or otherwise. It should also address non-employees whose contractual relationship with the issuer or firm purports to preclude the individual from providing information to the Authority, SRO or law enforcement agency or initiating, testifying in or assisting in proceedings (i.e. subsections (a) and (b) of Section 77(2)).

8. Restitution for Investors

Section 90(2) of the CMA allows the Tribunal to order a person who has contravened capital markets law to make restitution to one or more persons, if the Tribunal considers such restitution to be in the public interest. This may be done directly, through an investor compensation fund, or by paying an amount of money to the CRMA who will allocate the money.

In our submission to the Ontario Securities Commission ("OSC") in December 2011 on proposed enforcement initiatives[29] and our fraud report in 2011[30], FAIR Canada recommended that securities regulators should have the ability to order restitution directly to investors. The Ontario Legislative Standing Committee on Government Agencies Report also made this recommendation in its findings[31]. The OSC's Investor Advisory Panel has also called for this power in its submission on the OSC's proposed enforcement initiatives and noted that in the US, in certain cases, the SEC has the authority to order civil monetary penalties as well as disgorgement of financial gains. These civil penalties are collected by the SEC, which administers the "Fair Fund" for the benefit of investors who

[29] http://faircanada.ca/wp-content/uploads/2011/01/111220-FAIR-Canada-submission-re-OSC-proposed-enforcement-initiatives.pdf

[30] http://faircanada.ca/wp-content/uploads/2011/01/Financial-scandals-paper-SW-711-pm_Final-0222.pdf

[31] Standing Committee on Government Agencies: Report on Agencies, Boards and Commissions, Ontario Securities Commission, Marcy 2010, at page 24, available online at http://www.ontla.on.ca/committee-proceedings/committee-reports/files_pdf/OSC%20Report%20English.pdf.

suffer losses resulting from fraud or other securities violations (section 308(a) of the Sarbanes-Oxley Act).

Currently the OSC has to apply to provincial court to get restitution for investors (pursuant to section 128 of the Ontario Securities Act) but it rarely does so and this form of restitution is only available under the quasi-criminal power rather than the more commonly-used administrative power. FAIR Canada supports the ability of the Tribunal to order restitution.

This past October, FAIR Canada and Osgoode Hall Law School co-hosted a conference: "Public & Private Securities Enforcement: Improving Recovery for Investors" which examined, as an agenda item, the tools and mechanisms that the SEC has at its disposal to direct damages from enforcement actions towards investors as compared to the tools and mechanisms that provincial securities commissions have to do so.[32] FAIR Canada is of the view that providing the Tribunal with power to order restitution directly to investors is an important step in improving recovery for investors when they have suffered harm. FAIR Canada also recommends that the CMRA examine the ability to create "Fair Funds" as the SEC does, in order to help investors obtain recovery.[33]

9. Other Comments to Improve Enforcement

In order to ensure and enhance the integrity of the enforcement regime, FAIR Canada recommends that securities regulators address the issue of fine collection. A significant amount of fines are levied, but the actual collection rate by securities regulators is very low.

Additionally, FAIR Canada believes that enforcement outcomes, whether by settlement or by hearing, need to have transparency so that the public can assess whether the outcome is in the public interest. Accountability by both alleged wrongdoers and by securities regulators is furthered if there is transparency in the process so that the public is able to determine whether the settlement reached is in the public interest. Greater accountability allows for stronger, more effective enforcement.

Section 90(4) allows the Chief Regulator to order that a person make a payment in settlement of a proceeding or a potential proceeding under capital markets law, if the Chief Regulator has the consent of the person to whom the order is directed, without having to obtain approval of the Tribunal. We are of the view that this lacks transparency and we are concerned that this will weaken the CMRA's enforcement program despite possible short-term gains in efficiency. How will the public determine if the settlement is just and is in the public interest? Should all allegations against the person be made public and should the person not have to admit to the wrongs committed? Has the British Columbia Securities Commission ("BCSC"), which uses this process, undertaken any review of

[32] Investor Recovery Conference Agenda, held Monday, October 26, 2015, available online at http://faircanada.ca/wp-content/uploads/2008/12/PPSE-Conference-Agenda-October-20.pdf.

[33] Materials and video links related to the conference will be available shortly on FAIR Canada's website. See also the following academic articles: Verity Winship, "Fair Funds and the SEC's Compensation of Injured Investors, Florida Law Review, Vol.60, Issue 5, December 2008, available online at http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1061&context=flr; Urska Velikonja, "Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions, Stanford Law Review, Vol. 67, Issue 2, February 2015, available online at http://www.stanfordlawreview.org/print/article/public-compensation-for-private-harm. For media article reporting on this issue, October 30, 2015, Drew Hasselback and Barb Shecter, The Financial Post, "The OSC has introduced steps to help recover funds, but are they enough?, available online at http://www.financialpost.com/m/wp/news/blog.html?b=business.financialpost.com/news/fp-street/the-osc-has-introduced-steps-to-help-recover-funds-for-wronged-investors-but-are-they-enough&pubdate=2015-10-30.

the matters that it has settled through this power and made public its findings? We caution against the adoption of measures that may provide short-term benefits (through quickening up the process) at the expense of the strength of the CRMA's enforcement program overall.

10. FAIR Canada Opposes Advisor Incorporation

FAIR Canada is opposed to the incorporation of individual registrants of registered dealers and advisers in Canada as it will weaken efforts to protect Canadians and will not further the essential mandate of securities regulation.

The fundamental point is that the legal relationship currently existing between registered dealers/advisers and their individual registered representatives will not be preserved if those individual registrants are permitted to incorporate professional corporations. Incorporation fundamentally undermines the legal foundation of the relationship between the registered dealer/adviser and its individual registered representatives, and thereby diminishes the ability of dealers/advisers to maintain awareness of and effectively supervise the activities of their representatives – including their outside business activities. It is for this very reason that the current securities regulatory structure presumes the structure of an employer-employee or employee-agent relationship. Please see our comment letter to the Provincial/Territorial Council of Ministers in response to the Incorporation of Individual Representatives Project.[34]

FAIR Canada notes that professionals outside of the financial industry who have been allowed to incorporate, such as doctors and lawyers, are in a much different situation from individual registrants and maintain a fundamentally different relationship to their clients or patients. Most notably, these professionals are subject to the full obligations of fiduciary duties, and they remain personally liable and professionally accountable as fiduciaries even when they incorporate their practices. The comparison of these professionals' situations to investment advisors is not apt, since advisors are not yet subject to the fiduciary standard.

Allowing individual registrants to incorporate "professional corporations" would contribute to Canadian consumers' misunderstanding of the nature of the client-advisor relationship. Regulators and governments should not assist the financial industry in misleading consumers and helping them to profit from Canadians' trust. If consumers are told their "advisor" is a "professional corporation", this will further misrepresent the standard of care and the nature of the services provided and will exacerbate the misalignment of obligations and expectations.

A number of significant investor protection problems with the existing framework of securities regulation have been identified which should be a higher priority for governments and regulators than incorporation. Reforms should focus on improving investor protection rather than changing business structures so as to reduce tax liability for registrants.

We oppose having the possible incorporation of representatives of dealers and advisers be decided by 50% of all members of the Council of Ministers and the members of the Council of Ministers from each Major Capital Markets Jurisdiction, rather than have it dealt with by all the participating jurisdictions in light of the stated Purposes of the CMA or the MOA.

[34] Letter dated April 30, 2012 from FAIR Canada to Alberta's Ministry of Finance and Quebec's Ministry of Finance regarding the Incorporation of Individual Representatives Project Update, available online at http://faircanada.ca/wp-content/uploads/2011/01/120430-FAIR-Canada-submission-re-Incorporation-of-Individual-Reps.pdf.

However, if, nonetheless, the incorporation of "advisors" is dealt with through section 202(2) of the CMA, we trust that the policy-making process will be open, transparent and fulsome. In particular, a consultation process with all stakeholders, and most importantly, consumers and consumer-focused organizations, should be required; and benchmarking to other leading jurisdictions should take place as part of the process, at an early stage, to see whether the United States, Australia, the United Kingdom or the European Union has considered the issue and the results of any such deliberations.

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 Neil Gross at 416-214-3408 (neil.gross@faircanada.ca) or Marian Passmore (marian.passmore@faircanada.ca) at 416-214-3441.

Sincerely,

Neil Gross
Executive Director, FAIR Canada

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