

September 18, 2023

Ministry of Finance
Agency Relations and Regulatory Policy Unit
Frost Bldg. N 4th Flr
95 Grosvenor St
Toronto, ON
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Re: Proposed Regulation under the *Securities Commission Act, 2021* – Additional Purposes for the Ontario Securities Commission’s (OSC or Commission) Use of Enforcement Money (the Proposal)

FAIR Canada is pleased to provide comments in response to the above-referenced Proposal.

FAIR Canada is a national, independent, non-profit organization dedicated to being a catalyst for the advancement of the rights of investors and financial consumers in Canada. We advance our mission through outreach and education, public policy submissions to governments and regulators, and proactive identification of emerging issues. As part of our commitment to be a trusted, independent voice on issues that affect retail investors, we conduct research to hear directly from investors about their experiences and concerns. FAIR Canada has a reputation for independence, thoughtful public policy commentary, and repeatedly advancing the interests of retail investors and financial consumers.¹

Better Use of Enforcement Money for the Existing Purposes

A stated purpose of the Proposal is to better use the Commission’s existing enforcement money by expanding its ability to access its accumulated balance (approximately \$124 million based on the last reported statements). Additionally, it seeks to prevent future accumulation of large balances.

FAIR Canada agrees with the desirability of avoiding the accumulation of a large balance of enforcement money. Such money should be put to good use; it serves no purpose if it sits idle and unused.

It is important to remind ourselves, however, that the enforcement funds were collected in cases where investors were harmed. As such, the right thing to do would be for the Commission to continue to prioritize returning such money to those harmed investors.

¹ Visit www.faircanada.ca for more information.

We are not convinced that these monies could not be fully used under the existing purposes and would recommend against adopting new purposes at this time. Part of our concern is that the new purposes will divert attention from the well-established needs that continue to be underserved.

Rather, we urge the Commission to find more opportunities to allocate the enforcement proceeds towards the existing purposes. For example, despite having about \$120 million in enforcement money available, only about \$143,000 was paid to harmed investors in the fiscal year ending March 31, 2023 (compared to about \$730,000 in fiscal 2022, and \$4 million in 2021).

Where enforcement money cannot be allocated directly to harmed investors, the Commission should prioritize allocations to third parties that advocate on their behalf, seek to help educate them, or that promote the rights and perspectives of investors.

According to the OSC's most recent audited financial statements, the Commission used about \$4.6 million in enforcement money to recover costs it incurred for investor education and other investor knowledge enhancements. It also used only about \$1.6 million to help support the work of third-party investor education and advocacy organizations (such as FAIR Canada and Prosper Canada).

Given their lack of resources and funding sources, third-party organizations rely extensively on the Commission's ongoing financial support to carry out their missions. The OSC's support is critical in fortifying non-profit advocacy and other groups working to improve Ontario's capital markets and represent the interests of investors. Without such support, efforts to promote a strong investor protection culture within our capital markets would be severely undercut.

It is important that the OSC continue to play a leadership role in fostering a stronger investor protection culture, as the majority of investors in Canada reside in Ontario. The province is also home to the largest stock exchange and most intermediaries, including the highest number of investment fund managers.

Public Confidence Necessitates Strong Internal Controls

If the Government proceeds with the Proposal, we agree the Commission should develop internal controls governing these new expenditures. As a public interest regulator with a reputation for transparency and strong governance, the Commission is in the best position to establish robust controls for the new purposes.

A key challenge will be to ensure the new purposes do not significantly impede or detract from the existing purposes. Another challenge will be ensuring the enforcement money is not used, or perceived to be used, to fund what essentially amounts to the OSC's general

operations. This result would be highly inappropriate as it would, in effect, mean that harmed investors are subsidizing those in the industry that may have caused them harm.

Despite the Proposal's vague assurance that the enforcement money should not be used for "expenditures that are ongoing" (we assume this means to fund normal course operations), there is considerable concern that this may indeed be where we end up. This is because the examples of controls provided in the Proposal are insufficiently clear or rigorous.

Our key concerns in relation to the internal controls in the Proposal are:

1. There is nothing preventing the Commission from using the bulk of the enforcement money for one or both of the new purposes to the detriment of the existing investor-focused priorities. The fact that allocating the funds to these priorities has been the Commission's practice is of no comfort to future harmed investors or to third parties that rely on OSC allocations – practices can change over time.

We believe the Commission should place a cap on the amount that it can allocate under the proposed new purposes. This cap could be expressed as a ratio of the total amount available in the designated fund.

As stated, the bulk of the enforcement money should continue to be used to compensate harmed investors or allocated to, or for the benefit of, third parties that play a key role in promoting investor rights.

2. The Proposal lists several possible outcomes that could be used to justify planned technology/data expenditures. These include "an outcome that directly protects investors, market integrity and/or mitigates systemic risk". Our concern is that almost any technology or data expenditure could be justified based on any one of these outcomes.

For any planned expenditure, the OSC should be required to specifically demonstrate how it will protect investors or improve investor outcomes. Again, this view is based on the fact that the enforcement money was collected in cases where investors were harmed. As such, it should be used in a way that clearly benefits them, as opposed to either of the two other listed outcomes.

In addition, there should be a clear nexus in terms of how the expenditure benefits investors. For example, the Auditor General of Ontario's Value-for-Money Audit of the Commission recommended that the OSC:

- integrate the processes used to record and manage investor complaints; and
- prioritize an integrated approach to monitoring compliance and flagging problematic behaviour on a timely basis using technology tools.²

² Office of the Auditor General of Ontario, [Value-for-Money Audit of the OSC](#), December 2021 at p. 49 – 50.

These projects would help to manage investor complaints and identify behaviour that could lead to investor harm. We support the use of enforcement proceeds to fund projects such as these that would have a direct, beneficial impact on investors. There may be other examples, but we encourage the Commission in each case to look at how they will benefit investors specifically.

3. We have the same comment in respect of funding the activities of the OSC's Office of Economic Growth and Innovation. Again, the nexus between "fostering innovation, capital formation and competition in Ontario's capital markets" and protecting investors is open to interpretation and could easily be used to justify almost any innovation project. There should be a requirement to demonstrate a clear nexus with investor protection or an outcome that would benefit retail investors in a direct and meaningful way.

Moreover, we are concerned that justifying funding activities that are part of the Commission's broader mandate (fostering innovation, capital formation and competition) would amount to funding ongoing operations. As the Proposal makes clear, the Commission should refrain from using the enforcement money for ongoing expenditures.

Addressing these concerns will help ensure the public and stakeholders (beyond those regulated by the OSC) continue to trust and have confidence that investors and investor protection are at the top of the Commission's priorities.

Thank you for considering our comments on this important issue. We welcome any further opportunities to advance efforts that improve outcomes for investors. We intend to post our submission on the FAIR Canada website and have no concerns with the Ministry of Finance publishing it on its website. We would be pleased to discuss our submission with you. Please contact Jean-Paul Bureaud, Executive Director, at jp.bureaud@faircanada.ca or Tasmin Waley, Policy Counsel, at tasmin.waley@faircanada.ca.

Sincerely,



Jean-Paul Bureaud
Executive Director
FAIR Canada