

February 18, 2022

Capital Markets Act Consultation
Capital Markets and Agency Transformation Branch
Ministry of Finance
Frost Building North
95 Grosvenor Street, 4th Floor
Toronto, ON M7A 1Z1

Dear Sirs/Mesdames,

**Re: Ontario Ministry of Finance Proposal 21-MOF013
Capital Markets Act Consultation**

Thank you for the opportunity to provide comments on the *Capital Markets Act* (the “CMA”). We appreciate the Government of Ontario’s commitment to stakeholder consultation and engagement. Advocis, The Financial Advisors Association of Canada, supports the modernization of securities regulation in Ontario. To this end, Advocis provides the following comments aimed at strengthening the CMA.

1. ABOUT ADVOCIS

Advocis is the association of choice for financial advisors and planners. With over 17,000 member-clients across the country, we are the definitive voice of the profession. Advocis champions professionalism, consumer protection, and the value of financial advice. We advocate for an environment where all Canadians have access to the professional advice they need.

Advocis members advise consumers on wealth management; risk management; estate, retirement and tax planning; employee benefits; and life, accident and sickness, critical illness and disability insurance. In doing so, Advocis members help consumers make sound financial decisions, ultimately leading to greater financial stability and independence. In all that they do, our members are driven by Advocis’ motto: *non solis nobis* – not for ourselves alone.



2. OUR COMMENTS

Advocis believes advisor incorporation should be introduced by the CMA to boost efficiency in the securities distribution industry and ensure a level playing field compared to other financial services and professions. These benefits can be achieved while ensuring robust oversight of the regulated sector and without harming investors.

Advocis supports strong protection for whistleblowers against reprisals. Effective whistleblower protections should include independent contractors, given their increasing role within the capital markets and the broader economy.

We believe that effective regulation begins with a clear delineation of impermissible activities. To this end, we suggest that the list of prohibited unfair practices should be made more concrete.

Finally, we urge Ontario to center the client relationship in drafting the CMA.

These points are discussed in greater detail below.

a. **Advisor Incorporation**

Advocis urges Ontario to amend the draft CMA to permit advisors to incorporate. Allowing advisor incorporation will ensure Ontario's securities distribution market remains competitive and keep Ontario "open for business." Advisor incorporation has broad support across the industry and among policymakers. Ontario's capital markets modernization initiative represents the perfect opportunity to make this important change.

Incorporation will allow advisors to better manage the administration, taxation, and succession planning of their business. By allowing investment advisors to operate more efficiently, Ontario will spur further investment and competition in the sector, benefiting the Ontario public.

Today, many other professionals are already permitted to incorporate, or, at a minimum, direct revenue through a professional corporation. Doctors, lawyers, dentists, accountants, and real estate agents are all able to establish professional corporations. These professionals reap the benefits of incorporation.

Other financial professionals also benefit from incorporation in the administration of their business. Since 2010, the Mutual Fund Dealers Association of Canada ("MFDA") has allowed its Approved Persons to receive their commissions through a corporation.¹ Similarly, life insurance

¹ MFDA Staff Notice MSN-0072 (March 29, 2010): <https://mfda.ca/notice/msn-0072/>



agents are permitted to direct their compensation and business payments through corporations.

The exception to this rule is the securities distribution industry. This is unfair. Financial professionals deserve the benefits that flow from professional incorporation. In order to create a level playing field between financial advisors in securities distribution and other professionals, we urge Ontario to permit advisor incorporation.

We believe that the most effective mechanism to allow advisor incorporation would be to allow an incorporated entity to act as the registered salesperson, in addition to the individual (natural person) registrant. By requiring the corporation to register, the regulator would be able to effectively oversee regulated activities.

The experience of the MFDA has shown that the use of incorporation models is possible without any harm to the investing public. Prior to amending its rules in 2010, the MFDA suspended the application of the rules that prohibited the direction of commissions to corporations. The MFDA was then able to report to securities regulators that: “MFDA staff estimates ... that a high proportion of the approximately 40,000 remaining Approved Persons are likely to rely on its suspension. Despite these large numbers and the fact that the suspension has been in place for several years, **the MFDA has not identified any regulatory concerns**, including the liability of Approved Persons arising from the payment of commissions to corporations. **In this regard, the protections expected for investors under current legislation are maintained.**” [emphasis added]² The MFDA concluded that permitting payment of commissions to unregistered corporations was in the public interest and not detrimental to capital markets.³

Advocis supports legislation which clearly indicates that advisors continue to be subject to regulatory obligations and liability, even when permitted to incorporate. This can be seen in MFDA Rule 2.4.1 which specifies that the Approved Person continues to be subject to all the regulatory duties and remains liable for their conduct.⁴

There is also broad support for advisor incorporation. For instance, the Provincial/Territorial Council of Ministers of Securities Regulation (the “Council of Ministers”)⁵ conducted a consultation on advisor incorporation in 2010-2011. They reported: “**The overwhelming majority (59 of 63) of commenters strongly supported the adoption of a statutory incorporation model.** There was also near universal consensus on the critical importance of

² MFDA, Proposed Amendments to MFDA Rule 2.4.1 (Payment of Commissions to Unregistered Corporation): <https://www.osc.ca/en/industry/market-regulation/self-regulatory-organizations-sro/mutual-fund-dealers-association-canada/mfda-rule-review/proposed-amendments-mfda-rule-3>

³ *Ibid.*

⁴ MFDA Rule 2.4.1: <https://mfda.ca/policy-and-regulation/rules/mfda-rules/>

⁵ The Council of Ministers of Securities Regulation includes all Canadian provincial and territorial jurisdictions except Ontario.



investor protection, but the majority of commenters expressed the view that investor protection need not be diminished with an incorporation model.” [emphasis added]⁶

Support for advisor incorporation can also be found among policymakers. In 2012, the Council of Ministers indicated their strong support: “Council Ministers are committed to moving forward with the incorporation project.”⁷ Alberta and Saskatchewan have passed (but not yet proclaimed) legislation to permit advisor incorporation. The draft *Capital Markets Act* proposed for the Cooperative Capital Markets Regulatory System in 2015 defined a “professional company” and provided a framework for regulations implementing advisor incorporation.⁸

Now, with the modernization of Ontario’s securities legislation and the amalgamation of the Self-Regulatory Organizations (“SROs”), the time is right to implement advisor incorporation. Advisor incorporation will help ensure that Ontario retains a vibrant and competitive securities marketplace while bringing about fairness and a level playing field for securities professionals.

b. Reprisals

The regulation of Ontario’s capital markets requires effective protections for whistleblowers. As the Director, Enforcement, of the OSC has said: “Whistleblowers expose complex securities misconduct that may not otherwise come to light, allowing us to take timely action”.⁹ However, without protections against reprisals, whistleblowers may be deterred from coming forward, undermining securities regulation.

Independent contractors are increasingly important to the Ontario economy. For instance, Statistics Canada reports that 15.5 percent of Ontario workers were self-employed in 2018, representing a significant increase from past decades.¹⁰ The finance industry also reflects this trend: 19 percent of workers in the Canadian finance, insurance, real estate, rental and leasing sector were self-employed in 2018.¹¹ The importance of independent contractors is likely to continue growing in the coming decades with the rise of app-based marketplaces and the “gig economy”.

⁶ Provincial/Territorial Council of Ministers of Securities Regulation, “Consultation on Possible Options for the Incorporation of Individual Representatives of Registered Dealers and Advisers in Canada: Summary of Consultation Responses,” page 4: <https://securitiescanada.org/incorporation-sales-reps/2011-0728-consultation-incorporation-dealers-summary-of-responses.pdf>

⁷ Provincial/Territorial Council of Ministers of Securities Regulation, “Provincial/Territorial Council of Ministers of Securities Regulation (Council) Annual Progress Report January 2012 to December 2012,” page 3, <https://securitiescanada.org/2013-0411-progress-report-english.pdf>

⁸ Capital Markets Act: Revised Consultation Draft (August 2015), s. 2, 202: <http://ccmr-ocrmc.ca/wp-content/uploads/CMA-Consultation-Draft-English-August-2015.pdf>

⁹ <https://www.osc.ca/en/enforcement/osc-whistleblower-program>

¹⁰ In 1976, 10.5 percent of Ontario workers were self-employed. Lahouaria Yssaad and Vincent Ferrao, “Self-employed Canadians: Who and Why?” Statistics Canada (May 28, 2019): <https://www150.statcan.gc.ca/n1/pub/71-222-x/71-222-x2019002-eng.htm>

¹¹ In 1976, only 9 percent of workers in these industries were self-employed: *ibid.*



Given their increased prominence in the Canadian marketplace, independent contractors should also be protected against reprisals. Without these protections, some contraventions of Ontario securities law are likely to go unreported and unpunished, harming investors and undermining public confidence in the industry.

For this reason, Advocis supports an expansion of the protections contained in section 111 of the draft CMA to include independent contractors.

We also believe that the list of reprisals in subsection 111(2) should be modified to incorporate reprisals against independent contractors. For instance, an independent contractor could be subject to premature termination of their contract, or intimidation or coercion in relation to the contract in reprisal for a report to capital markets regulators. This type of reprisal should be prohibited by the CMA.

c. Unfair Practices

Advocis supports effective regulation of Ontario's capital markets. We believe that clear and concrete offence provisions are necessary to achieve effective regulation. Such provisions provide guidance to the industry and prevent misconduct.

In the CMA draft, section 105 prohibits unfair practices in the sale of securities and derivatives. Specifically, paragraph (a) of this section prohibits anyone from putting unreasonable pressure on a person. Paragraph (b) prohibits anyone from taking advantage of a person's inability or incapacity due to disability, ignorance, illiteracy, age or another cause. Paragraph (c) prohibits anyone from "engaging in any other prescribed practice that is fraudulent, manipulative, deceptive or unfairly detrimental to investors."

We support the inclusion of paragraphs (a) and (b) as unfair practices. An individual who puts unreasonable pressure on another or who takes advantage of a person's inability or incapacity is committing an unfair practice. This conduct should be prohibited.

We are concerned, however, that paragraph (c) is open-ended and unclear. We would appreciate insight into what practices Ontario intends to prescribe as unfair.

In other jurisdictions, a more definitive list of unfair practices is provided within the legislation. For instance, both Alberta and British Columbia provide concrete lists of prohibited unfair practices.

In Alberta, paragraph 92(3)(d) of the *Securities Act* prohibits unfair practices in relation to a trade in a security or derivative. Subsection 92(5) defines an unfair practice as (1) undue



pressure, (2) taking advantage of inability or incapacity, or (3) imposing terms that are “harsh, oppressive, or excessively one-sided.”¹²

In British Columbia, Subsection 50(4) of the *Securities Act* prohibits unfair practices by a person engaged in promotional activity. Like Alberta, subsection 50(6) defines an unfair practice as including: (1) undue pressure, (2) taking advantage of inability or incapacity, or (3) “imposing terms or conditions that make a transaction inequitable.”¹³

We suggest that Ontario should adopt a similar approach to Alberta and British Columbia, by providing a definitive list of unfair practices within the legislation itself. We would support a prohibition against oppressive or excessively one-sided terms in investment transactions. A definitive list would provide guidance to industry participants and prevent these unfair practices.

d. Financial Professionals

Advocis strongly supports Ontario’s broader work to modernize regulation within the financial services sector and protect investors. In particular, we note the significant impact that the *Financial Professionals Title Protection Act* (“FPTPA”)¹⁴ will have.

The FPTPA will raise the bar in the financial advice sector by establishing minimum training and competency standards for financial professionals who use ubiquitous and well-regarded titles. Ontarians rightly expect financial professionals to possess the expertise and skills needed to assist them with their most important financial decisions.

Further, by ensuring ongoing oversight, the FPTPA framework will increase professionalism within the industry. Credentialing bodies will be required to monitor the ongoing suitability of their credentialed financial professionals. This will help fulfill the purposes of the CMA, particularly investor protection. For instance, the FPTPA framework will ensure that financial professionals deal in good faith with their clients and appropriately manage any conflicts of interest.

The FPTPA also recognizes an important shift in financial services: financial advice is about client relationships, not simply transactions. Financial professionals need to understand their clients’ financial priorities, needs, and objectives. Financial professionals must assess how a particular suitable product helps advance those client objectives. The FPTPA framework recognizes that financial professionals need both technical knowledge and client relationship management skills.

¹² *Securities Act*, RSA 2000, c. S-4, s. 92, <https://www.gp.alberta.ca/documents/Acts/s04.pdf>

¹³ *Securities Act*, RSBC 1996, c. 418, s. 50, https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96418_01

¹⁴ *Financial Professionals Title Protection Act*, 2019, S.O. 2019, c. 7, Sched. 25.



We urge Ontario to be mindful of the important shift in focus away from product transaction and towards the client relationship in drafting the CMA. While ensuring efficient capital markets, the legislation must also protect investors and benefit client outcomes.

3. CONCLUSION

We thank the Government of Ontario for its work in modernizing Ontario's capital markets regulation. We look forward to continuing to work with the Securities Commission and the Government as the Rules required to implement this new platform legislation are developed.

We believe that the CMA can be strengthened by introducing advisor incorporation, ensuring independent contractors are protected from reprisals, including a more definitive list of unfair practices, and centering the advisor-client relationship throughout the CMA drafting process.

We continue to support the Government's work to ensure fair and efficient capital markets for the benefit of all Ontarians. Should you have any questions, please do not hesitate to contact the undersigned, or James Ryu, Vice-President, Advocacy and General Counsel at jryu@advocis.ca.

Sincerely,

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