



Canadian Foundation *for*
Advancement *of* Investor Rights
Fondation canadienne *pour* l'avancement
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RE: Review of the Federal Financial Sector Framework – Second Consultation Paper

FAIR Canada is pleased to offer its comments on the second consultation paper (“Consultation Paper”) relating to the review of the federal financial sector legislative and regulatory framework, which is being conducted by the Federal Department of Finance.

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.

1. Introduction

- 1.1. FAIR Canada is generally supportive of the Government’s focus on building long-term, inclusive economic growth to support Canadians, and agrees that a well-functioning financial sector is key to delivering this commitment. However, FAIR Canada believes that a well-functioning financial sector is dependent on recognizing the interests and needs of financial consumers. Appropriate safeguards designed to protect financial consumers and foster effective competition, should be included in any proposed legislative or policy initiative.
- 1.2. FAIR Canada’s submission provides the Department of Finance with input from the perspective of financial consumers and where applicable, investors specifically, that will be directly and indirectly impacted by any proposed legislative changes. The submission will focus on three of the four themes identified by the Department of Finance in the Consultation Paper:
 - a) Supporting a competitive and innovative sector;
 - b) Improving the protection of bank consumers; and
 - c) Modernizing the framework.
- 1.3. FAIR Canada’s comments related to each of these three themes are discussed below.

2. Supporting a Competitive and Innovative Sector

(i) *Ensuring Adequate Protections for Financial Consumers*

- 2.1. FAIR Canada supports the Department of Finance's goal of building a competitive and innovative financial sector. Competition and innovation are welcome developments as they can provide financial consumers with additional choices related to products and pricing, among other benefits. However, FAIR Canada wishes to remind the Department of Finance that the protection of financial consumers should be addressed and not assumed or taken for granted during this process.
- 2.2. Unfortunately, the language in the Consultation Paper regarding a competitive and innovative sector is almost exclusively dedicated to growth and does not contain a corresponding emphasis on ensuring that this growth is accompanied with adequate protections for financial consumers. For example, the Consultation Paper states that the Department of Finance is looking at how the legislative and policy framework for the financial sector aligns with a strong focus on economic growth. FAIR Canada believes that this issue cannot be viewed in isolation from the needs of financial consumers, nor can it be assumed that economic growth, by itself, will necessarily lead to good outcomes for financial consumers. The recent revelations regarding the banking sector sales practices through the CBC Go Public investigations (which will be discussed below) highlight this fact.
- 2.3. FAIR Canada encourages the Department of Finance to strongly consider the effects certain types of competition, innovation and economic growth will have on financial consumers, and to make sure that adequate protections are in place to protect financial consumers. To ensure a modern and effective regulatory framework, it is necessary to make consumer protection a central focus and to also make the financial sector one in which consumers can rightly place their trust and confidence.

Furthermore, the financial services framework should be informed by the 10 principles in the OECD's G20 High Level Principles on Financial Consumer Protection, of which Canada is a signatory.¹ The Government should also pay close attention to the need for a strong policy and regulatory focus on financial consumer protection as set out in the Framework section of this document.² This is crucial for adequate financial consumer protection, good outcomes for financial consumers (including socio-economic well-being) and to prevent systemic risk.

(ii) *FAIR Canada Supportive of Open Banking*

- 2.4. FAIR Canada supports open banking, which would result in increased transparency for financial institutions and increased information and control of finances for financial consumers. Open banking provides an opportunity for the development of innovative technologies and platforms that would improve the financial consumer experience, such as through tools encouraging increased financial management and the disclosure of financial products that could better benefit consumers. FAIR Canada supports open banking with the caveat that financial consumers would have to provide fully informed consent, and have the protection of appropriate privacy and cybersecurity safeguards.

¹ OECD G20 High-Level Principles on Financial Consumer Protection (October 2011), online: <<https://www.oecd.org/g20/topics/financial-sector-reform/48892010.pdf>>.

² OECD G20 High-Level Principles on Financial Consumer Protection (October 2011), at 4, online: <<http://www.oecd.org/daf/fin/financial-markets/48892010.pdf>>.

3. Improving the Protection of Bank Consumers

- 3.1. FAIR Canada appreciates that initiatives are underway to assess whether further improvements are needed to protect bank consumers. FAIR Canada urges the investigations to proceed as expeditiously as possible and reported in a timely manner.
- 3.2. As mentioned in the Consultation Paper, the investigations include:
 - The FCAC (Financial Consumer Agency of Canada) examining best practices in financial consumer protection across Canada;
 - The FCAC also reviewing bank sales practices to assess whether sales targets and incentives are contributing to poor outcomes for consumers; and
 - The Office of the Superintendent of Financial Institutions (“OSFI”) reviewing domestic retail sales practices at domestic systemically important banks.
- 3.3. While FAIR Canada acknowledges the Department of Finance’s interest in improving the protection of bank customers, we would like to see further direct involvement and timely and appropriate determinations on this matter. Furthermore, the examination of best practices in consumer protection should be undertaken by an independent reviewer, not the FCAC, with best practices and the role and function of the FCAC benchmarked against leading jurisdictions internationally. Finally, the review conducted by OSFI should not make the reputational risk of banks an overriding concern, but rather, the review should look at whether financial consumers are achieving good outcomes.
- 3.4. FAIR Canada would also like to note its disappointment that the Department of Finance did not specifically request input in this Consultation Paper on the topic of consumer protection at the banks, especially considering the importance and far-ranging consequences of this topic. FAIR Canada has been following the CBC Go Public investigations of improper sales practices at Canada’s banks, and like many, is concerned with the allegations made by former bank employees. These allegations centre on front-line staff at banks who are under pressure to sell customers products and services they do not need.
- 3.5. For example, CBC Go Public found that sales practices at the banks have led bank employees registered to sell investment products to violate their regulatory obligations. In some cases, employees stated they have broken the law to meet sales revenue targets, and revealed that doctoring documents and forging signatures are more common than people realize.³
- 3.6. The CBC Go Public revelations support FAIR Canada’s view that poor recommendations and bad advice are not the result of a few bad apples in the system, but result from compensation structures and firm-wide practices that place firms and representatives’ interests ahead of the interests of Canadians. The CBC Go Public media stories have been essential to shining light on the poor level of consumer protection in the financial services sector and highlighting the urgent need for reform in this area.
- 3.7. The following sub-sections provide comments on specific areas of concern FAIR Canada wishes to

³ This is consistent with the latest enforcement report of the Mutual Fund Dealers Associations (MFDA), online: <<http://mfda.ca/wpcontent/uploads/EnfAR2016.pdf>> and notices from December 2016 by the Canadian Securities Administrators, online: <http://www.osc.gov.on.ca/documents/en/Securities-Category3/csa_20161215_33-318_incentives.pdf>, the Investment Industry Regulatory Organization of Canada, online: <http://www.iiroc.ca/Documents/2016/4dd98e70-f053-4980-bc75-10ceb6f3940d_en.pdf>, and MFDA online: <<http://mfda.ca/bulletin/review-of-compensation-incentives-and-conflicts-of-interest/>>.

highlight related to consumer protection at the banks. These are: (i) increased consumer dependence but no obligation to act in the client's best interests; (ii) the lack of effective consumer dispute resolution; and (iii) the FCAC.

(i) Increased Consumer Dependence but No Obligation to Act in Client's Best Interests

- 3.8. Banks have expanded their business model beyond providing everyday banking services as they did in the past – such as traditional deposit accounts, mortgages, GICs and Canada Savings Bonds – and are increasingly offering a wide range of complex financial products.
- 3.9. Since the 1980s, financial products have become more complex with “the lines between types of financial products [becoming] blurry”.⁴ There is an increasing number of different financial products available,⁵ which makes it difficult for the average Canadian to be adequately informed about the different investment product options.
- 3.10. Many in the financial sector have seized on this opportunity by marketing and advertising themselves as providing trusted advice, emphasizing the holistic and advisory nature of their services and de-emphasizing the transactional nature of the relationships. Salespersons have become “advisors”, “financial advisors” and “financial planners”,⁶ while tellers at banks have become “client advisors”. At the same time, Canadians have been forced to become increasingly self-reliant to fund their retirement needs given the decline in the number of workplace pensions and shift away from defined benefit plans.
- 3.11. Banks hold a trusted position amongst Canadians because they are involved with Canadians’ savings, mortgages for their homes, their loans and their investments. The banks are in a unique position to have a significant impact on the long-term financial security of Canadians. However, there has been little regulatory change to account for the increasing “holistic and advisory nature” of relationships between employees and customers.
- 3.12. FAIR Canada takes issue with the statement in the Consultation Paper that “fair treatment of bank customers...should be an integral part of banks’ corporate culture. Banks’ boards should oversee consumer protection by ensuring that appropriate policies are in place and that management and staff carry them out.”⁷ As demonstrated by the CBC Go Public media stories on bank sales practices, “fair treatment” mischaracterizes and dilutes the nature of the abuses reported as occurring at the banks. But, more importantly, “fair treatment” is not a sufficient standard to adequately protect financial consumers. Rather, legislation needs to be revised to ensure that consumers are provided advice that is in their best interests. Bank boards alone cannot be relied upon to ensure adequate consumer protection in the absence of a best interest standard, as the focus of boards will remain on maximizing performance and profits.
- 3.13. Principle 6 of the G20 High-Level Principles on Financial Consumer Protection states that:
- “Financial service providers and authorized agents should have as an objective, to work in the **best interest** of their customers and be responsible for upholding

⁴ Final Report of the Expert Committee to Consider Financial Advisory and Financial Planning Policy Alternatives (1 November 2016), online: <<http://www.fin.gov.on.ca/en/consultations/fpfa/fpfa-final-report.html>> at 16-17 [Expert Report].

⁵ OSC Statement of Priorities for Fiscal 2011-2012 at 4, online: <http://osc.gov.on.ca/documents/en/Publications/sop_fiscal-2011-2012.pdf>.

⁶ Expert Report at 19.

⁷ Consultation Paper at 12.

financial consumer protection...Where the potential for conflicts of interest arise, financial services providers and authorized agents should endeavour to avoid such conflicts...The remuneration structure for staff of both financial services providers and authorised agents **should be designed...to avoid conflicts of interest...**⁸

- 3.14. FAIR Canada believes that a “best interest” standard is urgently needed for those engaged in providing financial advice to consumers.⁹ Such a best interest standard should include acting fairly, honestly, with a duty of loyalty to the client and avoiding conflicts of interest, among other things.¹⁰
- 3.15. A best interest standard would combat the proliferation of harmful products, damaging sales practices and financial incentives not in the client’s best interest. A best interest standard would be a significant step to ensuring that Canadians do not receive mis-selling and compromised advice, and would require banks to adapt their business practices so that employees no longer prioritize sales over the interest of the client.

(ii) Lack of Effective Consumer Dispute Resolution

- 3.16. There are different ombudservices depending on which financial services sector is involved – the Ombudservice for Banking Services and Investments (“OBSI”) for securities investments, the Ombudservice for Life and Health Insurance (“OLHI”) for insurance¹¹, and either OBSI or ADR Chambers Banking Ombuds Office (“ADRBO”) for banking complaints.
- 3.17. FAIR Canada believes the Government should reconsider its decision in 2012 to allow multiple external dispute resolution bodies to exist for banking complaints. Banks should not be permitted to directly hire and pay their own external dispute resolution provider. We refer the Government to our submission on the matter for a detailed explanation of why this is not in the public interest.¹²
- 3.18. FAIR Canada recommends that Government and regulators reform the process of consumer redress through ombudservices so that consumers obtain resolution of their complaint through a binding decision, if the consumer accepts the recommendation. **There should be one, independent, national ombudservice open to all financial consumers, regardless of what type of product or firm their complaint arises from.** This will improve compliance by firms and their individual registrants, while

⁸ High Level Principles at 7. See also Update Report on the Work to Support the Implementation of the G20 High-Level Principles on Financial Consumer Protection: G20/OECD Task Force on Financial Consumer Protection, Principles 4, 6 and 9 (September 2013), at 4 and 12 to 17, online: <<https://www.oecd.org/g20/topics/financial-sector-reform/G20EffectiveApproachesFCP.pdf>>. These are regulatory, supervisory and self-regulatory measures and practices, which have been developed and are considered by the Task Force to effectively implement key aspects of the G20 High-Level Principles. They are also consistent with approaches developed by a broader range of jurisdictions.

⁹ See FAIR Canada’s submission on a Best Interest Standard to the Canadian Securities Administrators (30 September 2016), online: <<https://faircanada.ca/wp-content/uploads/2016/10/160930-Final-FAIR-Canada-Submission-33-404-Best-Interest.pdf>> [FAIR Canada Best Interest Submission] and FAIR Canada, “Statutory Best Interest Standard Urgently Needed” (20 October 2016), online: <https://faircanada.ca/whats-new/statutory-best-interest-standard-urgently-needed/>>.

¹⁰ Ibid.

¹¹ The OLHI is not an effective ombudservice for insurance matters. OLHI is not subject to regulatory oversight and suffers from gaps in coverage which may result in an insurance complaint not being within OLHI’s mandate. In such instances, the consumer will have to resort to the court system, provided they can afford to do so and provided their claim is of a sufficient amount to make it worthwhile given the costs. It is preferable to allow consumers to have all financial services matters resolved through OBSI.

¹² FAIR Canada letter (13 August 2012), online: <<http://faircanada.ca/wp-content/uploads/2011/01/120813-final-banking-complaints-submission-FINAL.pdf>>.

allowing consumers to resolve their complaints effectively and efficiently.¹³ FAIR Canada urges the Government to be a leader in this regard and develop a body that has the power to implement binding decisions.

- 3.19. In addition, internal dispute resolution procedures at financial institutions should not be able to refer and encourage resort to “internal ombudsmen” since they do not meet the criteria to be an ombudsman. This causes confusion for consumers in their ability to access the true ombudservice that currently exist.
- 3.20. FAIR Canada recommends that consumers be provided with clear information about their complaint procedures from the financial institution and that banks not be permitted to confuse the complaint process by calling those involved in complaints at the banks “internal ombudsman”. FAIR Canada also recommends that the FCAC guidance for internal dispute resolution at federally regulated financial institutions be reworked to include requirements setting out clear rules including that a federally regulated financial institution has 90 days to resolve the complaint (including any internal review of the initial substantive response from the financial institution). Finally, FAIR Canada recommends greater clarity, compliance and transparency with respect to complaint data.¹⁴

(iii) The FCAC

- 3.21. FAIR Canada believes that something is clearly awry, when the poor sales practices and compensation structures at banks have been permitted to flourish while the FCAC has made statements such as: “[the FCAC has]...continued to solidify itself as Canada’s financial consumer watchdog – ready for any challenge on the road ahead.”¹⁵ FAIR Canada also is concerned, in light of the disturbing disclosures by bank employees, at how the FCAC has characterized market conduct among federally regulated financial entities as strong, “with no major or systemic concerns”.
- 3.22. FAIR Canada recommends that the powers, resources, and processes of the FCAC be reviewed so that it has the necessary structure, resources, legislative authority and processes to carry out its mandate and ensure effective compliance and enforcement over those it regulates. Changes should be made to ensure it is a strong market conduct regulator. The U.S.’s Consumer Financial Protection Bureau should be reviewed as a model.

4. Modernizing the Framework

- 4.1. FAIR Canada would also like to provide comments on modernizing the financial sector framework, particularly the questions related to corporate governance.

(i) Promoting Diversity on Boards

- 4.2. The Canadian Coalition for Good Governance (CCGG) has noted that research is increasingly demonstrating that diverse boards are good for shareholders and outcomes.¹⁶ Like CCGG, FAIR Canada

¹³ FAIR Canada’s submission to Ms. Deborah Battel, Independent Reviewer of OBSI, (26 February 2016), online: <http://faircanada.ca/wp-content/uploads/2016/02/160226-FAIR-Canada-submission-independent-evaluation-of-obsi_final-2.pdf>.

¹⁴ We believe firms are not all in compliance with their existing regulatory obligations to publish information regarding complaints in accordance with the Complaints (Banks, Authorized Foreign Banks and External Complaints Bodies) Regulations, section 4.

¹⁵ Financial Consumer Agency of Canada 2015-2016 Annual Report, online: <<https://www.canada.ca/content/dam/fcac-acfc/documents/corporate/planning/annual-reports/FCAC-annual-report-2015-16.pdf>>.

¹⁶ For example, CCGG has relied upon publications including: Russell Reynolds Associates, “Different is Better: Why Diversity Matters in the Boardroom” (October 2010), online: <<http://www.russellreynolds.com/insights/thought-leadership/different-is-better-why-diversity-matters-in-the-boardroom>>; Kellogg Insight, “Better Decisions through Diversity: Heterogeneity can Boost Group

believes that gender diversity on boards is important as it provides a good start on ensuring diversity. However, boards should ultimately be required to reflect a wide range of experiences, views and backgrounds, which can in turn provide shareholders with better performing boards that are more open and represent a broader perspective.

- 4.3. FAIR Canada is supportive of the proposal to implement a “comply or explain” model to promote the participation of women on boards of directors and in senior management of federally regulated financial institutions. As the Consultation Paper notes, diversity is recognized as a means to expanding the mix of skills, knowledge and experience of boards of directors.

(ii) Strengthening Shareholder Democracy

Establishing Annual Elections

- 4.4. FAIR Canada supports the Department of Finance’s proposal to require annual director elections. Staggered elections can limit shareholders’ ability to make changes to the board since not all directors will come up for re-election at the same time. In addition, if individual director elections are implemented, it is more logical to also formally require annual elections so that shareholders can implement changes to the composition of the board at a given date rather than over a period of years.

Mandating Individual Director Elections

- 4.5. FAIR Canada supports possible amendments that would prohibit slate voting in favour of voting for each individual director. This will allow shareholders to voice their level of support for each individual director and hold each individual director accountable. It will also provide insight into the level of support of security holders for each director.
- 4.6. Slate voting should be abolished as it does not provide shareholders with choice – the shareholder is forced to either vote for all of the directors on the ballot or withhold their vote from all directors. This form of voting does not allow shareholders to distinguish those directors who meet a high level of competence, integrity, and capability versus those who have fallen below an acceptable standard of performance.
- 4.7. FAIR Canada also agrees with the position previously been put forward by CCGG, that shareholders should have more involvement in the director nomination process.¹⁷

Majority Voting for Directors of the Board in Uncontested Elections

- 4.8. FAIR Canada urges changes to mandate majority voting rather than permitting the election of directors by plurality voting. Under plurality voting, the candidate receiving the most votes wins election to the board even if the candidate did not receive the votes of a majority of shareholders. Majority voting provisions support good governance by providing a meaningful way for security holders to hold directors

Performance” (1 October 2010), online: <https://insight.kellogg.northwestern.edu/article/better_decisions_through_diversity>; McKinsey & Company, “Women Matter: Gender Diversity, a Corporate Performance Driver” (2007), online: <file:///C:/Users/SBeg/Downloads/Women_matter_oct2007_english.pdf>; Andre Chanavat and Katherine Ramsden, “Mining the Metrics of Board Diversity” (June 2013), online: <https://share.thomsonreuters.com/pr_us/gender_diversity_whitepaper.pdf>;

¹⁷ Canadian Coalition for Good Governance, “Re: Department of Finance Canada: A Consultation Document for the Review of the Federal Financial Sector Framework Supporting a Strong and Growing Economy: Positioning Canada’s Financial Sector for the Future” (15 November 2016), online: <http://www.ccg.ca/site/ccgg/assets/pdf/nov_15_2016_department_of_finance_canadafinal.pdf>.

accountable and remove underperforming or unqualified directors.

- 4.9. The plurality system – where a single vote for a director (with the rest of the votes being “withheld”) is sufficient to be duly elected to the board – is inconsistent with good governance and is not in the best interests of shareholders. It does not allow underperforming directors to be voted off the board even if a majority of the shareholders withhold their vote for those directors. This can disengage shareholders from the proxy voting process and impede good corporate governance.
- 4.10. FAIR Canada supports majority voting given that most other international jurisdictions have adopted majority voting practices. Amendments should be made with a view to bringing corporate governance of federally incorporated corporations (including federally regulated financial institutions) in line with international best practices.

(iii) Federal Credit Unions and the Cooperative Credit Associations Act

Limitations on the Use of the Terms “Bank”, “Banker” and “Banking”

- 4.11. FAIR Canada supports the use of banking-related terms (“banking”, “you can bank”) by provincial credit unions, caisses populaires and other prudentially regulated non-bank deposit-taking institutions provided there is appropriate disclosure that the institution is not a bank under the Bank Act and necessary information about deposit insurance is prominently displayed and conveyed to customers

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 Frank Allen at 416-341-3443/frank.allen@faircanada.ca, Marian Passmore at [416-214-3441](tel:416-214-3441)/marian.passmore@faircanada.ca or Samreen Beg at [416-214-3442](tel:416-214-3442)/samreen.beg@faircanada.ca.

Sincerely,



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