



Enhancing Canadian Competitiveness by Reforming the Way Securities are Regulated in Canada

The Canadian Bankers Association's
submission to the Expert Panel on Securities
Regulation

July 15, 2008



CANADIAN BANKERS ASSOCIATION

The Canadian Bankers Association, which represents 51 domestic chartered banks, foreign bank subsidiaries and foreign bank branches operating in Canada and their 257,000 employees, appreciates the opportunity to make our views known to the Expert Panel on Securities Regulation. As we note below, reform to the structure and approach to the oversight of capital markets in Canada is of critical importance to the competitiveness of our economy.

The structure of securities regulation has been the subject of frequent debate in Canada over several decades now. The frequency of this debate and the volume of study and initiatives have clearly accelerated in this new millennium. Since 2003, we have had the Wise Persons' Committee, the Inter-Provincial Securities Initiative, the Crawford Panel on a Single Securities Regulator for Canada, the Task Force to Modernize Securities Legislation in Canada and this initiative, the Expert Panel on Securities Regulation. Two of these initiatives were established by the federal government, two were established by provincial governments and one was established by the industry itself. In addition, the RCMP commissioned a report on the workings of its Integrated Market Enforcement Team (IMET) and British Columbia drafted legislation to fundamentally revise the way in which securities markets are regulated by moving towards a principles-based approach to regulation.

Traditionally, these matters were examined within the context of how different aspects of the securities markets operated and were regulated. While useful, this was unduly narrow in terms of building the case for reform. Instead, it may be more appropriate to consider these matters in a broader context, which looks at reform of the securities system as one of many factors that helps to enhance the efficiency and productivity of the economy in general, and improves our international competitiveness as a result.

The Broad Context – Enhancing Global Competitiveness

Global competitiveness requires that we use our resources – whether labour, capital, management skills, etc. – as efficiently as possible. But Canada is hindered in this regard by a plethora of internal barriers to the movement of goods, services, people and capital. These barriers mean that production in Canada is not as efficient as it might otherwise be. One percent of Canada's population moves across provincial borders every year. The amount of interprovincial trade in goods and services equals 20% of national GDP, and approximately 9% of this amount represents trade in financial services. Over 90% of initial public offerings (IPOs) raise funds in more than one province. Many of these transactions are rendered less efficient and more costly by Canada's internal barriers.

The Role of the Financial Services Sector and Securities Regulation

Across the world, regulators and legislators are considering ways in which to enhance the competitiveness of their financial services sectors. And in doing so, they are enhancing the competitiveness of their economies overall, because the financial sector is a large and growing part of modern economies. The financial sector is itself an important (and growing) part of the economy and, by facilitating the way in which the goods and services sectors function, is a key driver of economic growth. In the United States, the financial sector accounts for 8% of GDP and 5% of all jobs. In the UK, it accounts for 10% of GDP and one-fifth of all new jobs. The financial sector's trade surplus exceeds £19 billion. In Canada, the financial sector accounts for 6% of GDP, up from 4% twenty years earlier. It accounts for 4% of all jobs today.

Although many factors affect the competitiveness of the sector and its ability to support economic growth, a key element (given how extensively the sector is regulated) is how efficient, flexible, responsive, and cost-effective the regulatory system is. And, given the key role that capital markets play in economic development, an important focus for reform is securities regulation. Indeed, the IMF recognized that Canada needs a new structure of securities regulation stating that a single securities regulator would allow for Canada to respond more quickly to local and global events, reduce costs for market participants, eliminate inefficiencies created by the limited authority of individual provinces and help simplify coordination with other enforcement agencies.¹

Similarly, the OECD's recent 2008 Economic Survey of Canada adds that "a single regulator would allow policy development to be streamlined, allowing Canada to respond more quickly to local and global events, and it would eliminate the inefficiencies created by the limited enforcement authority of individual provincial agencies".² And last month, the Competition Policy Review Panel called for the federal government to demonstrate leadership and implement a national securities regulator in the context of pursuing a public policy oriented towards competitiveness.³

In this submission, we will consider how the current structure and approach to securities regulation adds to this inefficiency and suggest ways to rectify that.

Regulatory Efficiency and Economic Competitiveness

Inefficient and ineffective regulation imposes unnecessary costs on market participants, undermines confidence in the markets that is needed to attract investment, and inhibits innovation through lack of timeliness and responsiveness. Set out below is a discussion of different aspects of how the current system negatively affects efficiency, confidence in the markets, and the ability of the system and individual participants to respond to changing market conditions and opportunities.

Economies of Scale in Canadian Capital Markets

Efficiency and competitiveness of the regulatory system are proportionately more important for Canada than for many other countries, especially the United States and the United Kingdom. The cost of complying with regulation is characterized by very clear economies of scale – regulation imposes a disproportionately high cost on smaller economies and smaller firms. And not only do smaller markets suffer from a lack of scale, they also suffer from a lack of liquidity, which is needed for markets to function well. Regulation should not compound these disadvantages.

Depending upon the measure used, Canada's capital market constitutes anywhere from 2% to 3.5% of the global total. The structure of regulation in Canada compounds this relative lack of size by making an already small market even smaller. If we were regulated and viewed internationally as a single market, Canada would rank after such countries as the United States, the United Kingdom, Japan, France and China. Our national market is larger than Germany's. But broken down as individual provinces (which is the effect of the

¹ International Monetary Fund (IMF), Financial System Stability Assessment, 2008, p. 7. Available on the internet at: www.imf.org/external/pubs/ft/scr/2008/cr0859.pdf

² Organization of Economic Cooperation and Development (OECD), Economic Survey of Canada, 2008, p. 52.

³ Competition Policy Review Panel, Compete to Win, 2008, p. 82. Available on the internet at: www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/h_00040e.html

current system), Ontario's size is smaller than Italy, Alberta's size is between Belgium and the Netherlands, Quebec is the size of a Denmark or a Finland and British Columbia compares with Ireland.

In addition, the average size of listed firms in Canada is much smaller than those in other nations. The average size in Canada is less than half that of a listed firm in the UK, a quarter that of a firm in either Japan or Germany and less than one-sixth that of a firm in the US. Canadian firms are even smaller than Australian firms on average. This is precisely why regulatory efficiency is important.

Since Canadian firms are smaller, regulatory inefficiencies have a proportionately bigger impact on them. Our regulatory structure limits SMEs' ability to tap into all of Canada's capital market and it imposes high costs on them. In particular, our own research⁴ has shown that:

- There are clear scale economies in developing and filing securities offerings. A \$1 million offering incurs four times the costs, relative to the amount of capital raised, as does a \$10 million offering.
- If these firms seek to raise capital in all 13 jurisdictions rather than just one, we estimate that regulation-related costs would double, to 16% of capital in the case of a firm seeking to raise \$1 million and to 4% of capital in the case of a firm seeking to raise \$10 million.
- In practice, these regulatory costs limit the number of jurisdictions in which firms seek to raise capital.

Principles-Based Regulation: Structural Reforms Support Content Reforms

Capital is highly mobile and there is evidence that it moves where regulation provides a competitive advantage – not the lightest regulation but where the confidence-building and innovation-enhancing aspects of regulation balance-off the costs of compliance. There is a general consensus that principles-based regulation, while not a panacea, has several clear benefits over a more rules-based approach. The UK's Financial Services Authority (FSA), which has established 11 principles of business that define the relationship between regulated institutions and the regulator, is frequently cited as a good model in this regard.

▪ Benefits of Principles-Based Regulation

Principles-based regulation is more consistent with a forward-looking approach to regulation. It permits dynamism and innovation, whereas rules often appear to be put in place to deal with yesterday's regulatory concerns. And principles appear to be more conducive to a culture of compliance – one can meet the letter of rules but not the spirit, whereas compliance with principles is all about compliance with the spirit of regulation.

There is a clear acknowledgement that the prescriptive approach to regulation is challenging the competitiveness of financial markets. It's noteworthy to point out that even leaders in New York City – regularly recognized as one of the top two global financial centres – are looking at principles-based regulation to bolster its financial services status. The 2007 Bloomberg-Schumer report entitled "Sustaining New York's and the US' Global Financial Services Leadership" recommended that a common set of principles be implemented to establish norms for good regulation in financial markets and provide enhanced guidance to financial institutions to deliver more balanced and predictable outcomes for market participants. These principles would underpin a shared vision for the importance and direction of the

⁴ Canadian Bankers Association, The impact of multiple regulators on the cost of raising capital for small and medium-sized businesses, Available on the internet at: www.cba.ca

financial sector and its impact on global competitiveness, innovation to meet customer needs, the management of systemic risks, the ethical conduct of business, the financing of a growing economy, and the creation of new jobs.⁵

- **The Challenges of Implementing Principles-Based Securities Regulation in a Fragmented Regulatory system**

The federal government's pursuit of a principles-based approach to regulation, witnessed in part by the terms of reference of this Expert Panel, offers the possibility of a profound change to the way in which regulation is undertaken. Although not easy to put in place, principles-based regulation holds out the prospect of a more flexible regulatory system. Unfortunately, the fragmented nature of our regulatory structure poses some significant challenges to moving in this direction. Consequently, what many observers see as the obvious path to enhanced competitiveness has more obstacles in Canada than it does in other jurisdictions. Rather than creating a Canadian advantage, our regulatory structure may lead to the creation of a regulatory disadvantage vis-à-vis other jurisdictions.

Implementing a principles-based system under the current fragmented system of securities regulation would make it difficult for firms to operate in multiple jurisdictions with regulatory certainty. Under the passport system, firms rely only upon their home jurisdiction regulator for access to multiple jurisdictions, but they must be prepared for those host jurisdictions, with whom they have no initial contact, to enforce compliance. This would prove problematic. Even if principles were uniform across the country, it is likely that the interpretation of these principles would be different. Principles are broad by their very nature and even when supported by rules, guidance materials, and communications with staff, regulatory interpretations are bound to be inconsistent. Indeed, the FSA notes that a key to implementing principles-based regulation is continual communications between regulator and regulated entities. This kind of continual evolution is bound to result in differences from one jurisdiction to another.

By contrast, a principles-based regulatory system under a single securities regulator would be more consistent. This is absolutely necessary as market participants need to have a high degree of trust in regulators' interpretations. Principles such as "treating customers fairly" and "conducting its business with integrity" and "managing conflicts of interest fairly" are difficult to interpret consistently when there is no overarching corporate guidance for the regulators.

Free Trade in Securities

Canadians are increasing their demand to hold foreign securities in their portfolios. Indeed, in 2006, Canadian investors held \$737.7 billion worth of foreign securities, up almost 77% from 2003.

Free trade in securities with other key jurisdictions would allow Canadians to acquire these securities in an efficient and cost-effective manner. They would have direct access to foreign markets and foreign broker-dealers. This would increase the availability of information about foreign investment opportunities, promote greater diversification and investment choices, reduce trading and transaction costs through technology integration, and increase oversight coordination among regulators. Free trade in securities also helps to

⁵ Joint Report, The City of New York, Office of the Mayor- United States Senate, Sustaining New York's and the US' Global Financial Services Leadership, p. 104. Available on the internet at: www.nyc.gov/html/om/pdf/ny_report_final.pdf

overcome some barriers that frustrate public policy goals such as providing greater foreign investment options to Canadians who save through tax-sheltered investment vehicles.

Against this backdrop, the federal government has committed to advancing free trade in securities bilaterally with the US and in the G7. Similarly, the Securities and Exchange Commission (SEC) in the US has pursued international mutual recognition agreements. Last year, the SEC held a roundtable on Mutual Recognition. And in March of this year, the SEC stated that it would be exploring opportunities to undertake comparability assessments with other jurisdictions, leading to a formal process for engagement on mutual recognition.

Canada's current securities regulatory system makes it more difficult to negotiate robust and comprehensive free trade agreements in securities. This is illustrative in the SEC's decision to announce formal discussions with the Australian Securities and Investment Commission (ASIC) before its Canadian counterparts, despite the fact that Canada has much closer ties with the United States through trade, investment, immigration and formal agreements (i.e. NAFTA, MJDS). There is no doubt a demand on the part of Canadian investors for US securities as 52% of the total value of foreign securities held by Canadians is allocated to US securities amounting to \$380 billion.

The May 29th press release between the SEC and the Canadian Securities Administrators (CSA) indicating work on a process that would guide talks on the establishment of a mutual recognition regime between Canada and the United States is welcome. It indicates that Canada is still in the running for such an agreement. At the same time, though, there are numerous risks that cannot be ignored and hurdles to overcome.

- The SEC is taking a two-tiered approach to mutual recognition agreements, with initial agreements with select national regulators while only developing a framework for discussions with multiple securities regulator jurisdictions.
- Canada is still some distance from a mutual recognition agreement – this announcement merely refers to an agreement to develop a process for discussion.
- Any eventual agreement will be based on a comparability assessment of the regulatory regimes of the two countries.
- As these would be bilateral agreements, it is possible that the scope and extent of the agreements would still vary from country to country.

The CBA strongly supports free trade in securities and encourages governments and regulators to see that these negotiations succeed. We also want to make sure that any mutual recognition agreement is as extensive and robust as possible and that the current structure of regulation does not impede the achievement of such an agreement.

Enforcement of Securities Laws

A key element that will be taken into consideration when comparing Canada and the United States is the effectiveness of securities law enforcement. Securities regulation should deliver fair, vigorous and timely enforcement and compliance programs in order to achieve investor confidence in capital markets. Absent such confidence, investors will demand a risk premium, driving up the cost of capital.

Many commentators have questioned the effectiveness of securities law enforcement in Canada, suggesting that it is slow, that a number of high profile cases have not been taken up by regulators and that insufficient resources are devoted to enforcement. Often these concerns are linked to the fragmented system of regulation in Canada. The 2006 Cory-Pilkington research study observed that: “Unless enforcement is perceived to be effective, its deterrent value is undermined. In fact, perceptions of the effectiveness of an enforcement system are often as important as reality.”⁶

More recently, Nick LePan, in his report to the RCMP Commissioner had the following to say:

*The existence of multiple securities regulators in Canada can make achieving consensus on issues difficult and time consuming. For example, it took considerable time to sort out the approach to sharing of information between regulators and the police in Canada and between Canadian authorities and their international partners. It is not fully resolved. Canada did not have a uniform position vis-à-vis its international partners. Again, different provincial regulators have different interpretations of court decisions which has hampered setting up joint securities intelligence units with the RCMP in some provinces, though these are a success in other provinces.*⁷

Local regulatory enforcement of securities laws has a number of shortcomings as compared with a national approach; it tends to lack the necessary expertise and resources, and it lacks commitment to securities enforcement as a priority. Provincial and local law enforcement agencies set their own priorities, and may not make investor protection and the investigation and prosecution of securities offences a priority. Many provincial regulators and most local law enforcement authorities lack expertise in investigation and prosecution of securities offences, and have few opportunities to acquire such expertise. As well, investigations and formal proceedings, when undertaken by provincial and local law enforcement agencies, do not usually extend beyond provincial boundaries.

Passport: Not Sufficient Five Years Ago and Not Sufficient Today

Although the Passport System is promoted as a ‘virtual single regulator’ because it is meant to provide single window access to multiple jurisdictions for many (but, we would note, not all) aspects of securities regulation, it still falls short in a number of respects. It does not deliver, and indeed cannot deliver, the reforms needed to cope with the current economic and financial environment.

Passport Does Not Create a Single Market for Investors

The CBA has noted above that the existing system makes it costly for SMEs to raise capital. It is also counterproductive for investors, who can face limitations in their investment options in our regulatory system. This is a real detriment to Canadian investors who are relying more and more upon their personal investments to save for retirement. We have examined IPO data available on SEDAR to see what kind of investment opportunities Canadians across the country have and whether the passport system has increased

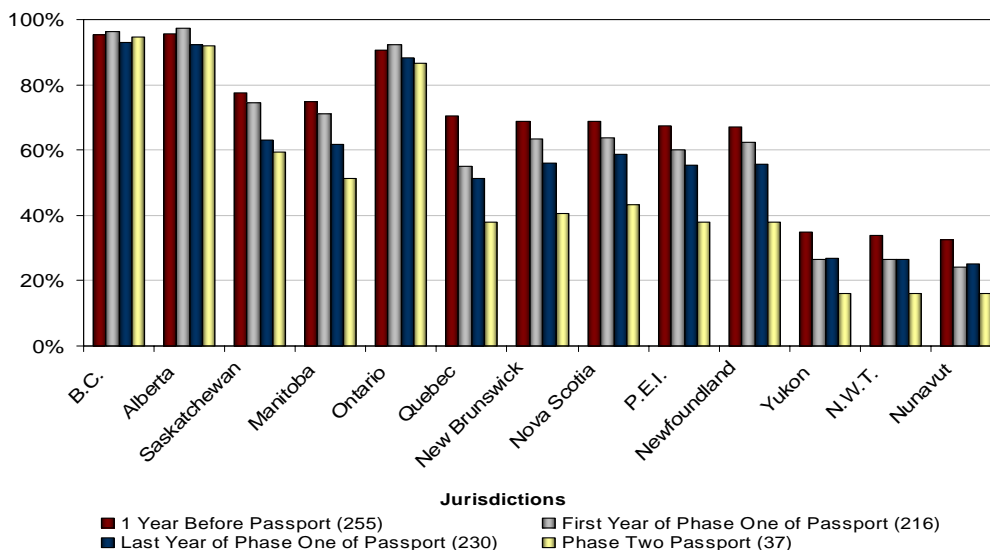
⁶ The Hon. Peter de C. Cory, C.C. & Marilyn L. Pilkington, Critical Issues in Enforcement: Commissioned by the Task Force to Modernize Securities Legislation in Canada, Available on the internet at: [www.tfmsl.ca/docs/V6\(4\)%20CoryPilkington.pdf](http://www.tfmsl.ca/docs/V6(4)%20CoryPilkington.pdf), p. 191

⁷ Nick LePan, Report to the Commissioner: Enhancing Integrated Market Enforcement Teams, Achieving Results in Fighting Capital Markets Crime, Available on the internet at: www.rcmp-grc.gc.ca/imets/report_lepan2007_e.htm, Chapter 6.

their options. Investor options in the smaller provinces have not increased and have actually diminished somewhat since the implementation of the passport system:

- Despite single-window access of the passport system, retail investors outside B.C., Alberta and Ontario continue to be limited in the availability of IPOs. In the year before the implementation of the passport system, retail investors in B.C., Alberta and Ontario were able to participate in over 90% of the number of IPOs. Retail investors in the remaining provinces were able to participate in between 67% and 77% of the IPOs, while retail investors in the territories were able to participate in only a third of the IPOs. Over time, the options have not increased but have gradually declined. During the first three months of phase two of the passport system, preliminary indications based on a small sample size indicate that retail investors in the smaller provinces were able to participate in between 38% and 60% of IPO issues and retail investors in the territories participating in 16% of IPOs.

**Distribution of Initial Public Offerings
(by Province/Territory)⁸**



Passport Does Not Eliminate Uncertainty

One test of passport proponents' claims would be to ask whether issuers and registrants who do business across Canada can confidently rely on principal regulator-only knowledge, expertise and counsel, limited to the laws and rules of their principal jurisdiction, when filing offering documents, registration applications, continuous disclosure and exemption applications? Does Canada actually combine the best of both worlds, by offering the simplicity and seamlessness of a single national regulator while respecting the local autonomy of each jurisdiction? The answer is clearly no. Under the current system, the reality is that **all** local rules still have to be complied with, whether they are rules of the principal regulator's jurisdiction or rules of the other non-principal jurisdictions.

⁸ Data was obtained by surveying the final long form prospectuses of all securities issuing IPOs and the accompanying final receipts issued by the various securities commissions filed on the System for Electronic Document Analysis and Retrieval (SEDAR). This was done for four different time periods using September 19th, 2005 as the first day of Phase 1 of the passport system and March 17th, 2008 as the first day of Phase 2 of the passport system. The number of IPOs surveyed per time period is represented by (n).

Passport Does Not Respond Quickly and Does Not Guarantee Harmonization

The difficulty in coordinating 13 different jurisdictions in a passport system leads both to slow decision-making and implementation, and entrenches a lack of harmonization in the regulatory system.

▪ **Slowness**

Under the passport system of securities regulation, reform is done in a piecemeal fashion and can be held up by elections, changes in governments, legislative calendars and differing priorities. The process by which the passport system was put in place reflects this slowness. In the Action Plan⁹ that accompanied the Provincial/Territorial MOU on Securities Regulation, there was a commitment to complete the development and implementation of highly harmonized securities laws by December 31st, 2006. On June 19th, 2008 - more than three years after Nova Scotia first introduced amendments to securities legislation and about 18 months after the target, the Northwest Territories was the last jurisdiction to pass the needed legislation.

Similarly, the passage of Securities Transfer Acts – legislation aiming to reduce cost and risk in the securities settlement system – is forecast to be just as lengthy. Ontario was the first to introduce legislation in December 2005, followed by Alberta in April 2006. While other provinces have followed, the Council acknowledges the remaining jurisdictions are expected to introduce similar legislation in 2009.¹⁰ This is what the current system promises going forward.

▪ **Lack of harmonization**

The challenges presented by the Passport system are apparent when surveying the recent proposed reforms to NI 31-103 (Registration Requirements) and NI 45-106 (Prospectus and Registration Exemptions). Despite the National Instruments, the continued regulatory fragmentation leads to complexity and confusion that may undermine capital market participants' understanding and compliance of applicable requirements in each jurisdiction. As it stands now, there are sections of the proposed National Instruments that will not be applied nationally, as there are a myriad of methods of implementation, exemptions and restrictions based on jurisdiction, including the following:

- Uncertainty surrounding the possibility that jurisdictions will adopt and administer the Instrument in different ways.
- Implementation of different triggers, based on trading or business, for dealer registration. Furthermore, there is uncertainty surrounding the factors taken into account when interpreting business triggers.
- Lack of clarity as to the application of dealer, adviser and investment fund manager requirements to federally-regulated financial institutions outside of Ontario.
- Lack of harmonization for the registration regime for short-term debt.
- Allowing different standards for the registration of exempt market dealers.
- Retention of limits on the number of out-of-province clients that dealers and representatives can service.

⁹ Council of Ministers of Securities Regulation, Provincial/Territorial Securities Initiative: Action Plan to Improve Canada's Securities Regulatory Framework, Available on the internet at: www.securitiescanada.org/2004_0930_action_plan_english.pdf, p. 6.

¹⁰ Provincial/Territorial Council of Ministers of Securities Regulation (Council), Annual Progress Report, January 2007 to December 2007, Available on the internet at: www.securitiescanada.org/2008_0122_progress_report_english.pdf, p. 4.

- Implementation of differing requirements for complaint handling procedures and uncertainty surrounding which securities regulatory authority registrants are required to report to.
- Allowing different registration requirements for sub-advisers.
- Differing prospectus requirements for offering memoranda.

Despite the desire for harmonization, it is surprising that provincial securities commissions would propose so many notable variations.

No Single International Voice

An important ingredient in enhancing international competitiveness is the ability to influence the international regulatory system in which a market operates so that the regulatory system supports that country's institutions. A common criticism of the fragmented system of regulation is that Canada does not speak with one voice on the international stage and hence might not be as effective in protecting Canada's interests.

In virtually every international forum, the international community has the highest of regard for Canada's system of financial sector regulation which, to use a popular phrase, is able to punch above its weight and have a level of influence in excess of the size of the financial marketplace. Whether it be banking or life insurance, OSFI is recognized as being on a par with the world's best regulators. Canada's role in the implementation of Basel II is an example of this. Canadian securities regulators also are well respected, but the fragmented nature of securities regulation in Canada limits their influence. Fragmentation of the Canadian capital market and its regulatory structure is a sure way to make Canada's voice irrelevant on the international stage, lost in the cacophony of provincial ones.

The CSA does not currently speak for Canada on the international stage nor is it capable of doing so. It is not listed as a member of IOSCO and no references have been found to the CSA's involvement on the international stage. None of this should be surprising as the CSA cannot speak for Canada because it has no power to commit to anything. It is merely an organization of provincial and territorial securities regulators that seeks to achieve greater harmonization in securities regulation. It has no authority to speak for individual regulators and it has no authority to make commitments for those regulators or their governments.

While the CSA can be Canada's ear on the international stage, agreeing to take back suggestions for consideration, it has no power to be Canada's voice. The passport system does nothing to rectify this.

Financial Market Events

Financial regulators have a crucial role to play in minimizing systemic risk and preserving the stability of the financial system as demonstrated by the recent global financial market turmoil. Capital markets and financial markets are not separate and distinct. As such, regulators increasingly operate in an environment where events in one market have a significant effect on other markets.

In Canada, through the Financial Institutions Supervisory Committee (FISC), federal agencies have a forum to exchange information with regard to financial institutions. This forum is chaired by the Superintendent of Financial Institutions and includes the Governor of the Bank of Canada, the Chair of the Canadian Deposit

Insurance Corporation (CDIC), the Deputy Minister of Finance and the Commissioner of the Financial Consumer Agency of Canada (FCAC). The FISC identifies potential problems, assesses the impact of unexpected events, shares information and considers strategies to deal with financial institutions in serious difficulty.

The formal FISC architecture does not reflect the links between capital markets and financial institutions. While there is an exchange of information between provincial securities regulators and members of the FISC, and we expect even more cooperation going forward to respond to the recommendations of the Financial Stability Forum, a more formal architecture would be useful to help ensure that all regulators can efficiently and predictably share all the information needed to perform their duties effectively.

While Canadian securities regulators do communicate with federal regulators, it is not as formal and transparent as it is in other jurisdictions such as Australia and the United States, or subject to a unified accountability system under one Minister. In Australia, the Council of Financial Regulators acts as a forum to facilitate co-operation and collaboration between the Reserve Bank of Australia, the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission and the Australian Treasury. Its ultimate objectives are to contribute to the efficiency and effectiveness of regulation and to promote stability of the Australian financial system.

Similarly, in the United States, there is a coordinating body of financial regulators that includes regulators for both the capital markets and financial institutions. The President's Working Group on Financial Markets (PWG) serves as a mechanism for inter-agency coordination and communication regarding financial market regulatory and policy issues that cross jurisdictional lines. The PWG comprises the Treasury Secretary, the Chairmen of the Board of Governors of the Federal Reserve System (FRB), the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC). On occasion, the Group works in conjunction with the statutorily established Federal Financial Institutions Examinations Council (FFIEC).¹¹

In our view, the current fragmentation in the accountability and coordinating structures for financial services regulation and capital market regulation could be addressed more effectively and expeditiously if there was a single securities regulator in this country. We believe this can only enhance the quality of our regulatory system.

A Road to Reform

The Canadian Bankers Association supports the creation of a single, national regulator that would enable issuers, investors and registrants to participate in the marketplace under a single set of rules, administered, interpreted and enforced by a single body, and subject to a single set of fees. The rationale for such a reform is obvious – Canadian capital markets are for the most part national and, indeed, international in scope. The CBA's analysis of capital raising activities indicates that over 90% of transactions take place in more than one province or territory. We believe the regulatory structure should reflect this economic reality.

¹¹ Similar to Canada's FISC in terms of membership, the FFIEC is a formal interagency body federally legislated to promote uniformity and consistency in the supervision of financial institutions through the prescription of principles, standards, and report forms for the federal examination of financial institutions. The FRB, Federal Depository Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Office of the Comptroller of the Currency (OCC) and the Office of Thrift Supervision (OTS) sit on the FFIEC.

Over the past five years, a number of models for a single/common/national regulator have been put forward, each of which had some element of federal-provincial cooperation. These include the CBA's federal-provincial opt-in model set out in our 2003 submission to the Wise Persons Committee,¹² the Wise Persons' Committee's Canadian Securities Commission with its 'collaborative architecture', and the Crawford Panel model for a provincially-based model with some federal involvement.

With the exception of Ontario, no province has publicly expressed a strong interest in the creation of a new regulatory body. Even the Crawford proposal, with its corporate governance model in which every province and territory has an equal voice, has failed to garner public support from the other provinces despite its effort to create a structure that was designed to address all of the provincial concerns that had been articulated to that point. Instead, the others have taken the approach of developing the passport system, which maintains the system of multiple regulators. As we have noted above, we believe the passport system to be lacking in a number of respects.

The CBA has always supported the creation of a cooperative federal-provincial body to regulate securities matters but, given the impasse that now appears to exist, perhaps it is time to consider another approach, still consistent with cooperative federalism.

In 2003, three legal opinions commissioned by the Wise Persons Committee concluded that the federal government has constitutional jurisdiction over securities and that, should there be a conflict between federal and provincial legislation which frustrated federal objectives, then the federal government could assert its paramountcy in this area. Accordingly, the CBA urges the Expert Panel to explore mechanisms by which the federal government can assert its authority over securities matters. One way that this could be achieved is that, in drafting the model common securities act, the Panel include the necessary provisions to create a Canadian Securities Commission (CSC) that would report to the federal Minister of Finance, have a governance structure appointed by the federal government that is aimed at ensuring capital markets and other relevant expertise while also reflecting regional interests, and be responsible for administering the act across Canada. The act should specify that an objective is to ensure that capital market participants, who are subject to the act, are able to have access to the entire Canadian market subject only to compliance with the terms of the act. The federal government should be encouraged to introduce and seek passage of the legislation in the Parliament of Canada as soon as possible after the Panel reports.

Recognizing that provinces now regulate activities that would in future be subject to the federal CSC, one way to proceed could be for the federal government to set a period of time – say 18-24 months – before the legislation comes into effect to allow for transition discussions and negotiations with the provinces. These discussions could involve compensation issues for provinces that would suffer a revenue loss in the absence of securities fees; trade-offs in other areas of federal-provincial jurisdiction (in the context of both strengthening the economic union under the federal sphere and clarifying provincial roles in social issues); and issues of logistics and transfers of responsibility.

While it would be hoped that all transition issues could be addressed during the 18-24 month period, it is realistic to expect that some issues with some provinces will remain outstanding. Rather than delay implementation of the CSC indefinitely, however, one approach the Panel could consider is to recommend

¹² Canadian Bankers Association, Proposals for an Efficient and Effective Securities Regulatory System in Canada, Available on the internet at: www.cba.ca

that the federal government bring the CSC into effect in those parts of Canada where issues with provinces have been addressed at the end of the 24 month period, to hold off implementation of the statute in those parts of Canada where there are still outstanding issues with provinces, and to continue discussions with those provinces. Clearly, there would need to be incentives put in place to help facilitate resolution of issues during the original transition period, and clearly the discussions with remaining provinces could not continue indefinitely. While a situation where for a period time there was a CSC in most parts of the country and provincial regulators in other parts of the country would not be ideal, it would be preferable to the 13-jurisdiction fragmentation that now exists and in any case would likely only be an interim state since it would result in significant market and international pressure on the remaining provinces to come on board.

Conclusion

The Wise Persons' Committee titled its 2003 report "It's Time." Five years later, it is clear that none of the models proposed to date by that Committee or the other Task Forces have prompted the provinces to move to a single regulator. Accordingly, we have suggested for the Expert Panel's consideration an approach that could break the log-jam. There may be other approaches that could be considered, but what is key in our view is that, however it is structured, more assertive action by the federal government is needed to make a Canadian Securities Commission a reality. We believe it is time for the federal government to act decisively so as to break the impasse that currently exists.