



Doug Hyndman

BETWEEN THE LINES

Two steps back

Having principles is fine, but what Canadian investors really need is tougher securities enforcement to protect their savings.

by Al Rosen



We have, in Canada, what might be referred to politely as a behavioural approach to the regulation of investments, pensions and retirement savings. In other words, the people at the top, those in charge of protecting investors, put on a good face, pretend everything is great and hope that illusion becomes reality.

It's an approach peppered with easy answers, platitudes and generalities, phony promises, variable goals and, ultimately, bitter disappointment for investors. This perpetual dance always follows the

same one-step-forward, two-steps-back pattern.

The latest step back was the appointment of Doug Hyndman to oversee the establishment of Canada's new national securities regulator, which has been 75 years in the making (if you mark the founding of the U.S. Securities and Exchange Commission as the time Canada should have woken up).

While Hyndman's appointment has generally been viewed as an attempt to appease the anti-Ontario crowd, the decision has far-reaching consequences in terms of the tone and culture that will exist at the new regulator.

What investors need badly is tougher securities enforcement to protect their savings. Unfortunately, this concept borders on the heretical for Hyndman and the rest of the "principles-based" regulation crowd.

Whether it is securities regulation or accounting rules, principles alone simply cannot get the job done. Unfortunately, only investors want to see prescriptive rules added to toughen up difficult-to-enforce principles. Companies fight against added regulations at every turn and have the financial backing and lobbying organizations to do it.

And while the dead-eye focus on principles-based regulation is disturbing, it is Hyndman's lack of interest in enforcement that is downright dangerous for investors.

A few months following Conrad Black's conviction for fraud and obstruction of justice, Hyndman gave a speech to the Economic Club of Toronto addressing what he called the myths of securities regulation. One dandy was the myth that a national regulator would be of any benefit to Canada. That's right, the same entity he just signed up to run would be of no clear benefit to the country.

Nevertheless, his truly unfortunate comments came regarding enforcement, claiming that "regulators have neither the responsibility nor the authority to send people to jail." He went on to argue essentially that securities regulators are content to administer fines (a cost of business) and levy suspensions (temporary relief at best) against mere two-bit market swindlers.

Yet, before Hyndman completely sidestepped all serious enforcement responsibility, he did admit that it was the purview of regulators to protect investors from future market misconduct. Unfortunately, the

enforcement record of the British Columbia Securities Commission, which Hyndman has chaired for more than two decades, clearly does not back up that assertion.

Despite having the authority to fine and punish companies for using slippery financial reporting, the regulators have been happy to defer to the accountants, who by the way also have an unhealthy affinity for principles-based oversight.

So, once again we see behavioural regulation at work. Spend all the effort convincing people there is no problem, instead of simply fixing the issue.

Given that our market cops are jumping into action only after their U.S. counterparts start investigating problems at the likes of Nortel, Hollinger, Livent and RIM, investors are better off buying shares in

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companies that fall under the protection of U.S. securities regulators. That doesn't mean that Canada has to be avoided. It just means that investors should consider sticking to Canadian companies that have a dual listing in the U.S., and thus the protection of U.S. oversight.

While this kind of regulatory arbitrage can only address some of the systemic Canadian problems, at least investors can take control of the situation, instead of remaining exposed to the ongoing gyrations of the behavioural regulation dance.

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