

B.6 Request for Comments

- B.6.1 Proposed OSC Rule 11-502 Distribution of Amounts Paid to the OSC under Disgorgement Orders; Proposed Companion Policy 11-502 Distribution of Amounts Paid to the OSC under Disgorgement Orders; Proposed OSC Rule 11-503 (Commodity Futures Act) Distribution of Amounts Paid to the OSC under Disgorgement Orders; Proposed Companion Policy 11-503 (Commodity Futures Act) Distribution of Amounts Paid to the OSC under Disgorgement Orders – Modernize the Process to Distribute Disgorged Amounts to Harmed Investors**

NOTICE AND REQUEST FOR COMMENT

PROPOSED OSC RULE 11-502
DISTRIBUTION OF AMOUNTS PAID TO THE OSC UNDER DISGORGEMENT ORDERS

PROPOSED COMPANION POLICY 11-502
DISTRIBUTION OF AMOUNTS PAID TO THE OSC UNDER DISGORGEMENT ORDERS

PROPOSED OSC RULE 11-503
(COMMODITY FUTURES ACT) DISTRIBUTION OF AMOUNTS PAID TO THE OSC UNDER DISGORGEMENT ORDERS

PROPOSED COMPANION POLICY 11-503
(COMMODITY FUTURES ACT) DISTRIBUTION OF AMOUNTS PAID TO THE OSC UNDER DISGORGEMENT ORDERS

MODERNIZE THE PROCESS TO DISTRIBUTE DISGORGED AMOUNTS TO HARMED INVESTORS

July 11, 2024

Introduction

The Ontario Securities Commission (the **OSC** or the **Commission**) is publishing the following for a 90-day comment period, expiring October 9, 2024:

- Proposed OSC Rule 11-502 *Distribution of Amounts Paid to the OSC under Disgorgement Orders* (the **Rule**)
- Proposed Companion Policy 11-502 *Distribution of Amounts Paid to the OSC under Disgorgement Orders* (the **CP**)
- Proposed OSC Rule 11-503 *(Commodity Futures Act) Distribution of Amounts Paid to the OSC under Disgorgement Orders* (the **CFA Rule**)
- Proposed Companion Policy 11-503 *(Commodity Futures Act) Distribution of Amounts Paid to the OSC under Disgorgement Orders* (the **CFA CP**)

Collectively, the Rule and the CFA Rule are referred to as the **Proposed Rule**, and the CP and the CFA CP are referred to as the **Proposed Companion Policy** in this Notice.

We are issuing this Notice to solicit comments on the Proposed Rule and the Proposed Companion Policy that establishes a process to distribute money received by the Commission under disgorgement orders to harmed investors. This process is intended to be streamlined, transparent, and efficient, and is designed to support better and timelier investor redress.

Importantly, this new process is an additional tool available to the Commission to return money to harmed investors. The Commission will also continue using other existing tools for this purpose, including using no contest settlements and receiverships, in appropriate cases.

We welcome all comments on this publication. The Proposed Rule and Proposed Companion Policy are available on the Commission's website at www.osc.ca.

As part of the implementation of this framework, the Commission will develop plain language resources to assist investors to better understand the new statutory distribution framework and the process to apply for payments under this framework.

Substance and Purpose

On November 2, 2023, the Government introduced Bill 146, *Building a Stronger Ontario Together Act (Budget Measures), 2023*¹ (**Bill 146**). Bill 146 included legislative amendments to the *Securities Act (Ontario)*² (the **OSA**), the *Commodity Futures Act (Ontario)*³ (the **CFA**), and the *Securities Commission Act, 2021*⁴ (the **SCA**). These amendments establish a new statutory framework governing the distribution of money received by the Commission under disgorgement orders⁵ to investors who incurred direct financial losses as a result of the contravention of Ontario securities law or Ontario commodity futures law giving rise to the disgorgement order. These legislative amendments follow on recommendations of the Capital Markets Modernization Taskforce⁶ (**Taskforce**) and the Auditor General of Ontario⁷ to establish such a framework.

Bill 146 received Royal Assent on December 4, 2023, but the amendments related to this new statutory distribution framework will come into force at a later date to be named by proclamation of the Lieutenant Governor. The new statutory distribution framework will apply to disgorgement orders issued on or after the date the legislative amendments come into force. It is anticipated that the Proposed Rule and the Proposed Companion Policy will come into force at the same time as the legislative amendments.

The new statutory distribution framework provides that regulations (which may take the form of an OSC rule or a regulation made by the Lieutenant Governor in Council) will address:

- the circumstances in which money received by the Commission under disgorgement orders is required to be distributed;
- the eligibility requirements for investors seeking a payment from the disgorged amounts received by the Commission;
- a process for distributing disgorged amounts to harmed investors in cases where a court-appointed administrator is not used; and
- the use of other monetary sanctions and settlement payments received by the Commission to pay certain administrative costs in relation to the distribution of disgorged amounts.

The Proposed Rule and the Proposed Companion Policy are being published for comment to address these matters.

In setting the circumstances in which disgorged funds received by the Commission are required to be distributed, the Proposed Rule takes a broad approach. It is proposed that the Commission will make disgorged funds received available for distribution in all cases unless:

- (1) the disgorgement was ordered in relation to a contravention of the “insider trading and tipping” prohibition under section 76 of the OSA, or
- (2) the amount received is too small to justify the costs of distributing it.

Other than in the above circumstances, funds will be made available for distribution to potential harmed investor applicants through a notice and claims process that can be conducted by either a court-appointed administrator or directly by the Commission following the process established under the rule. While the method of distribution will depend on the circumstances of the case, it is anticipated that most distributions will be conducted through a court-appointed administrator.

Background

Tribunal’s Authority to Order Sanctions, including Disgorgement

Under the OSA and the CFA, the Tribunal has the authority to make orders imposing a range of sanctions. These sanctions are intended to prevent future harm to investors and the capital markets by deterring future misconduct by the respondent or others generally. They are not imposed to remedy past harms or compensate harmed investors.⁸ In addition to non-monetary sanctions,

¹ 1st Sess, 43rd Leg, Ontario, 2023 (assented to 4 December 2023).

² R.S.O. 1990, c. S.5.

³ R.S.O. 1990, c. C.20.

⁴ S.O. 2021, c. 8, Sched. 9.

⁵ Disgorgement orders may be made by the Capital Markets Tribunal (**Tribunal**) under paragraph 10 of subsection 127(1) of the OSA and paragraph 10 of subsection 60(1) of the CFA, or by the Superior Court of Justice under paragraph 15 of subsection 128(3) of the OSA and paragraph 11 of subsection 60.2(3) of the CFA.

⁶ Capital Markets Modernization Taskforce, *Capital Markets Modernization Taskforce – Final Report*, (2021) at 107.

⁷ Office of the Auditor General of Ontario, *Value-for-Money Audit: Ontario Securities Commission*, (2021) at 32.

⁸ For a discussion of the Commission’s regulatory mandate under section 127 of the OSA, see the Supreme Court of Canada’s decision in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 (CanLII), [2001] 2 SCR 132.

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the Tribunal may order two types of monetary sanctions: (1) administrative penalties, and (2) disgorgement.⁹ Respondents may also be required to make other monetary payments under Tribunal orders approving settlement agreements.

Disgorgement is an equitable remedy that aims to deprive a wrongdoer of illegally obtained amounts. Disgorgement is distinct from restitution. Restitution is a remedy that aims to restore a person to the position they would have been in if not for the improper action of another. Accordingly, amounts ordered to be disgorged are quantified based on evidence of amounts obtained by a respondent as a result of their non-compliance with the OSA or the CFA and not on the basis of any related losses that may have been incurred by an aggrieved person or company.

Currently, monetary sanctions and settlement payments received by the Commission may be used to pay for the Commission's costs of enforcing orders of the Tribunal and may also be allocated by the Commission in accordance with subsection 19 (2) of the SCA. Specifically, this provision allows the Commission to allocate the funds:

- (1) to or for the benefit of third parties,
- (2) for use by the Commission or third parties for the purpose of educating investors or promoting or otherwise enhancing knowledge and information of persons regarding the operation of the securities and financial markets, or
- (3) for any other purpose specified in the regulations¹⁰.

Under the new statutory distribution framework, and in circumstances prescribed by regulations, the Commission must make amounts received under disgorgement orders available for distribution to harmed investors. Administrative penalties and settlement payments will continue to be dealt with in accordance with subsection 19 (2) of the SCA.¹¹ In addition, disgorged amounts that the Commission is unable to distribute under the new framework and disgorged amounts that are not subject to the distribution requirement under the Proposed Rule must be dealt with in accordance with subsection 19 (2) of the SCA. For clarity, disgorged amounts that are not subject to the distribution requirement under the Proposed Rule are either amounts that do not meet the threshold for distribution, or amounts received in relation to a contravention of the "insider trading and tipping" provision under section 76 of the OSA.

Court's Authority to Order Disgorgement

Under the OSA and the CFA, the Ontario Superior Court of Justice is also authorized to order a person or company that has not complied with or is not complying with Ontario securities law or Ontario commodity futures law to disgorge any amounts obtained as a result of the non-compliance. Currently, amounts disgorged under such orders are payable to the Minister of Finance. Under the legislative amendments, these amounts will be payable to the Commission and must be made available for distribution to harmed investors in accordance with the new statutory distribution framework.

Importantly, in contrast to the Tribunal, the Ontario Superior Court of Justice also has a range of additional remedial powers. These remedial powers include the ability to require a person or company that has not complied with or is not complying with Ontario securities law or Ontario commodity futures law to compensate or make restitution to an aggrieved person or company. Similarly, if a person or company is convicted of an offence under the OSA or the CFA, the Ontario Court of Justice may order the convicted person or company to make restitution or pay compensation in relation to the offence to an aggrieved person or company. It is anticipated that in cases that are brought before the courts, the Commission will continue to seek compensation and/or restitution orders in appropriate circumstances. Any money received as a result of these court orders is payable by the respondent directly to the named aggrieved party and is not subject to the new statutory distribution framework.

Current Practice Relating to Monetary Sanctions Received by the Commission

There is currently no statutory requirement or prescribed process to distribute monetary sanctions received by the Commission to harmed investors. However, the Commission's practice is to allocate these funds to investors who were directly harmed by the conduct giving rise to the payment if it is practicable in the circumstances to carry out a distribution. This assessment is made before any other possible uses for funds received in a given case are considered and includes a consideration of whether there is an appropriate mechanism to carry out the distribution.

In most cases, a claims-based process is necessary to identify harmed investors and quantify and verify their financial losses. Currently, the only avenue for the administration of a claims-based process under the OSA and CFA is a receivership. Section 129 of the OSA and section 60.3 of the CFA allow the OSC to apply to the Superior Court of Justice for an order appointing a

⁹ The Tribunal's authority to order disgorgement was added to the OSA and the CFA in 2002 based on the recommendation of the Five Year Review Committee Final Report which noted that the primary purpose of the disgorgement remedy is to deprive the wrongdoer of ill-gotten gains. See Five Year Review Committee, *Five Year Review Committee Final Report - Reviewing the Securities Act (Ontario)*, (2003) at 218.

¹⁰ On February 5, 2024, a new Ontario Regulation 28/24 was made which specifies that the Commission may allocate funds for two additional purposes: (1) to enhance its information technology, data acquisition and data analytics capabilities; and (2) to fund the activities of the Commission's Office of Economic Growth and Innovation.

¹¹ When funds are received in respect of amounts owing by a respondent under an order or settlement agreement, the Commission's practice is to apply the amount received first towards any unpaid disgorgement, then towards administrative penalties and finally, towards costs.

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receiver over the property of any person or company if it is appropriate for the due administration of Ontario securities law or Ontario commodity futures law. The OSC has relied on section 129 of the OSA to have a receiver appointed by the court to manage a claims process to distribute monetary sanctions to harmed investors. However, this approach is generally only suitable in circumstances where the amount available for distribution is sufficient to bear the costs of a receivership.

There is currently no alternative process for carrying out distributions that are smaller in value or less complex. In these situations, the OSC has generally sought the assistance of the Ontario Ministry of the Attorney General (**MAG**) to carry out the distribution using the civil forfeiture and claims adjudication process under the *Civil Remedies Act, 2001*.¹² The MAG distribution process requires the MAG to first obtain a forfeiture order from the court over the funds held by the Commission. There may be additional steps associated with this claims process, including, for example, seeking orders from the Tribunal to permit sharing of investor related information obtained during the underlying enforcement matter.

In limited circumstances, where there were a very small number of identifiable investors with readily quantifiable losses, the Commission has directly distributed funds to these harmed investors.

Importantly, there are other mechanisms to return money to harmed investors at various stages of an enforcement proceeding. For example, in relevant cases, respondents can pay investors directly under the terms of a settlement agreement approved by the Tribunal¹³, or receivers can be appointed to preserve or recover assets for investors¹⁴. The OSC will continue to use these other avenues depending on the circumstances of the case.

Recommendations and Consultations

In January 2021, the Taskforce¹⁵ recommended that a statutory process be put in place to support the distribution of disgorged funds to harmed investors. Specifically, the Taskforce recommended that this process should apply in cases where funds have been collected and there is sufficient evidence to establish that investors suffered direct financial losses. In making this recommendation, the Taskforce noted the importance of distributing ill-gotten gains recovered through the OSC's collection efforts to investors who were harmed. This is important because investors may not be able to independently recover funds from the respondent. The Taskforce recommended that these distributions be carried out through a court-supervised process. The Taskforce noted that the proposed model would only apply to disgorgement amounts that are collected by the OSC, and not to administrative penalties or settlement payments. The latter would continue to be allocated to third parties or used for other purposes authorized in securities legislation.

In October 2021, the Ontario government undertook a public consultation on a draft *Capital Markets Act* (the **CMA**) which was developed as part of its Capital Markets Modernization Review. Section 120 of the draft CMA addresses the distribution of disgorged funds to harmed investors. This provision requires that these funds be distributed to persons who incurred direct financial losses and satisfy the conditions, restrictions and requirements established under OSC rules. The provision contemplated that these distributions would be carried out either through a court-appointed administrator or by the OSC in accordance with rules established by the OSC.

Subsequently, the Auditor General of Ontario, in the December 2021 Value for Money Audit¹⁶ of the OSC, recommended that the Ontario Ministry of Finance work with the OSC to ensure that monetary sanctions collected by the OSC are distributed to harmed investors in an effective and timely manner, after reviewing the process in other jurisdictions. The Auditor General's report noted that the Ministry had expressed support for improving the OSC's ability to distribute disgorged funds to harmed investors and had initiated work to consult on a framework based on recommendations of the Taskforce through the publication of the draft CMA.

Distribution Frameworks in Other Jurisdictions

In developing the Proposed Rule and the Proposed Companion Policy, the Commission has reviewed and considered the above-mentioned recommendations and consultations as well as comparable frameworks across different jurisdictions. While the Proposed Rule and the Proposed Companion Policy draw on elements of each of these frameworks, the British Columbia Securities Commission (**BCSC**) framework served as the starting point for the Proposed Rule and the Proposed Companion Policy.

¹² S.O. 2001, c. 28.

¹³ These payments are case, fact, and respondent specific. In some years payments may be minimal and in other years uncommonly high. In respect of the latter, see for example, the excess fee cases that were resolved with regulated market participants in the last 10 years: [IPC Securities Corporation \(Re\), 2018 ONSEC 29](#), [Assante Capital Management Ltd. \(Re\), 2017 ONSEC 45](#), [BMO Nesbitt Burns Inc. et. al. \(Re\) \(2017\), 40 OSCB 57](#), [Manulife Securities Incorporated \(Re\), 2017 ONSEC 29](#), [Scotia Capital Inc. et. al. \(Re\) \(2016\), 39 OSCB 7211](#), [CIBC World Markets Inc. et. al. \(Re\) \(2017\), 40 OSCB 957](#), [Quadrus Investment Services Ltd. \(Re\) \(2015\), 38 OSCB 10093](#), [CI Investments Inc. \(Re\) \(2016\), 39 OSCB 1739](#), [TD Waterhouse Private Investment Counsel Inc. \(Re\) \(2014\), 37 OSCB 10742](#).

¹⁴ For example, the Commission has recently successfully sought the appointment of receivers in the following matters: (1) Bridging Finance Inc. – receiver appointed on April 30, 2021, (2) Go-To Developments – receiver appointed on December 10, 2021; (3) Traynor Ridge Capital – receiver appointed on November 3, 2023; and (4) Traders Global Group Inc. and Muhammad Murtuza Kazmi – receiver appointed on December 21, 2023.

¹⁵ *Supra* note 6.

¹⁶ *Supra* note 7.

Canada

The BCSC and the Autorité des marchés financiers (**AMF**) both have statutory frameworks for distributing disgorged funds to harmed investors, but each take a different approach.

Under the BCSC's framework,¹⁷ in all cases where the BCSC receives money from a disgorgement order, it must publish a notice and receive and consider applications for payment from the money collected. Claims can be made only by eligible applicants who, among other things, suffered pecuniary loss as a direct result of misconduct that resulted in an order that gave rise to a claims process under section 15.1 of the *Securities Act* (British Columbia)¹⁸.

Under the AMF's framework, a distribution process initiates if Québec's Financial Markets Administrative Tribunal issues a disgorgement order and if "the proof justifying the order" shows that persons have sustained a loss in the course of the non-compliance. In these cases, the tribunal will order the AMF to provide to the tribunal the process for the distribution of disgorged amounts unless there is evidence that the distribution process itself would cost more than is available for distribution.¹⁹

In February 2023, the Canadian Investment Regulatory Organization of Canada published a distribution of disgorged funds proposal for public comment.²⁰ This proposal would allow investors who suffered direct financial losses because of the contravention giving rise to a disgorgement payment to make a claim for disgorged funds. Claims can only be made following the completion of enforcement proceedings and payment of sanctions.

As described above, in Ontario, another analogous statutory process exists under the *Civil Remedies Act, 2001*. This process allows the MAG to ask the court for an order to freeze, take possession of, and forfeit to the Crown, property that is determined to be a proceed or instrument of unlawful activity. Once the funds are forfeited to the Crown, notice of a claims process is posted on a website of the Government of Ontario and mailed to the last known address, if available, of any known victims of the specific unlawful activity. Notice is not required to be posted where, having regard to the number of potential claimants and the amount available for distribution, the amount payable to each claimant would be too small to justify the administrative costs of adjudicating claims.

United States

The U.S. Securities and Exchange Commission (**SEC**) also has a statutory framework to distribute disgorgement and civil monetary penalties to harmed investors. In the United States, funds collected by the SEC may be distributed to harmed investors through the creation of what is called a "fair fund".²¹ The SEC publishes a notice of a proposed plan of disgorgement or a proposed Fair Fund plan for public comment. The plan may provide for these funds to be paid to the United States Treasury. This occurs where the costs of administering a plan of disgorgement relative to the value of the available disgorgement funds and the number of potential claimants would not justify distribution of the disgorgement funds to injured investors.

A third-party administrator may be appointed to administer the distribution or it may be administered by an SEC employee. If the administrator is not an SEC employee, the administrator may file an application for fees for completed services, and upon approval by the SEC or a hearing officer, may be paid a reasonable fee for those services. Unless otherwise ordered, fees and other expenses of administering the plan must be paid first from the interest earned on the funds, and if the interest is not sufficient, then from the funds available for distribution.

New Ontario statutory distribution framework

In brief, Bill 146 provides that:

- In circumstances prescribed by the regulations, money received under a disgorgement order must be distributed to persons or companies who,
 - incurred direct financial losses as a result of the contravention giving rise to the payment; and
 - satisfy the conditions, restrictions and requirements set out in the regulation.²²

¹⁷ British Columbia Securities Commission, "Returning Funds to Investors" (last visited May 8, 2024), online: <https://www.bcsc.bc.ca/enforcement/administrative-enforcement/administrative-sanctions/returning-funds-to-investors>.

¹⁸ RSBC 1996, c 418.

¹⁹ *Securities Act*, CQLR c V-1.1, s. 262.2.

²⁰ Canadian Investment Regulatory Organization, "Proposal on Distributing Funds Disgorged and Collected through New SRO Disciplinary Proceedings to Harmed Investors" (February 1, 2023), online: <https://www.ciro.ca/news-room/publications/proposal-distributing-funds-disgorged-and-collected-through-new-sro-disciplinary-proceedings-harmed>.

²¹ U.S. Securities and Exchange Commission, "Investor Bulletin: How Victims of Securities Law Violations May Recover Money" (June 21, 2018), online: <https://www.sec.gov/resources-investors/investor-alerts-bulletins/how-victims-securities-law-violations-may-recover-money>.

²² OSA, s. 128.1 (2); CFA, s. 60.2.1 (2).

- Distributions may be carried out by a court-appointed administrator or directly by the OSC in accordance with the regulation.²³
- Certain administrative costs relating to distributions (carried out either using a court-appointed administrator or directly by the OSC) are eligible to be paid from the disgorged amount that is being distributed or, in accordance with the regulation, from money described in subclause 19 (2) (b) (iii) or clause 19 (2) (c) of the SCA.²⁴
- Any money received by the Commission that is not subject to the distribution requirement, or any money remaining after payments are made to harmed investors or towards the payment of administrative costs, shall be dealt with in accordance with subsection 19 (2) of the SCA.²⁵

The legislative amendments create a flexible framework for distributions allowing for OSC rules or Lieutenant Governor in Council regulations to address:

- the circumstances in which money received by the Commission under disgorgement orders is required to be distributed;
- the eligibility requirements for investors seeking a payment from the disgorged amounts received by the Commission;
- a process for distributing disgorged amounts to harmed investors in cases where a court-appointed administrator is not used; and
- the use of other monetary sanctions and settlement payments received by the Commission to pay certain administrative costs in relation to the distribution of disgorged amounts.

The next section summarizes the key provisions of the Proposed Rule and the Proposed Companion Policy.

Summary of the Proposed Rule and the Proposed Companion Policy

Part 1 – Definitions and interpretation

Part 1 sets out definitions relevant to the Proposed Rule. “Eligible applicant” is a key definition which describes who may apply for payment from the disgorged amount.

Part 2 – Requirement to distribute

Part 2 sets out that disgorged amounts received by the Commission must be distributed in accordance with the OSA, the CFA and the Proposed Rule and also sets out the circumstances where a distribution is not required.

The Commission has generally adopted the approach followed by the BCSC where money received by the Commission must be subject to a claims process in all cases. However, the Proposed Rule provides some exceptions to this requirement: (1) where the disgorgement was ordered in relation to a contravention of the “insider trading and tipping” prohibitions under section 76 of the OSA, or (2) where the amount received by the Commission is too small to justify the costs of distributing it.

Insider Trading Prohibition Exception

If the Commission received disgorged amounts related to a contravention of the “insider trading and tipping” prohibitions under section 76 of the OSA, it is proposed that a distribution would not be required. While insider trading and tipping causes harm to the fairness and the integrity of the capital markets as whole, it may be difficult to establish that this conduct has caused direct financial harm to particular investors or to quantify any such losses. In this regard, it should be noted that while section 134 of the OSA establishes statutory civil liability relating to insider trading, which includes certain considerations for the court in calculating damages (depending on whether the plaintiff purchased or sold securities), that calculation is distinct from how the Tribunal typically calculates disgorgement in regulatory cases (i.e., based on the amounts obtained by the respondent as a result of the contravention). Any disgorged amount received in insider trading and tipping cases will be dealt with in accordance with subsection 19 (2) of the SCA. Under section 19(2) of the SCA, the Commission continues to have the discretion to allocate the disgorged amount to or for the benefit of third parties. In an exceptional case, this could include allocating the disgorged amount to a person or company who incurred a direct financial loss as a result of the insider trading or tipping that resulted in the disgorgement order.

²³ OSA, s. 128.1 (4) and (10); CFA, s. 60.1.2 (4) and (10).

²⁴ OSA, s. 128.1 (9) and (12); CFA, s. 60.1.2 (9) and (12).

²⁵ OSA, s. 128.1 (14)-(15); CFA, s. 60.1.2 (14)-(15).

Partial Amounts Received Exception

Consistent with the AMF, SEC, and MAG distribution frameworks, the Proposed Rule provides that the Commission is not required to make a distribution if the amount received by the Commission is too small to justify the costs of a distribution. The application of this exception will take into account the value of the amount received under the disgorgement order, the number of potential eligible applicants, and the anticipated costs of administering a distribution. This exception is intended to ensure that distributions remain cost effective.

Historically, collection rates from regulated market participants have been much higher than from respondents sanctioned on, for example, matters related to fraud. This is because assets are typically non-existent or inaccessible in fraud matters. When collection steps are required, the Commission often collects amounts on an incremental basis. Based on the Commission's experience, it may take as long as three years to fully assess the likelihood of potential recovery and make those recoveries. To account for this practical reality, subsection 2 (2) requires the Commission to hold these amounts for three years or until sufficient amounts are collected to warrant carrying out a distribution. This three-year period is intended to give the Commission adequate time to make reasonable efforts to take collection steps before considering using the lesser amounts received for other purposes authorized under subsection 19 (2) of the SCA. The Proposed Rule also provides the Commission with discretion to hold the funds for potential distribution for a longer period if there is ongoing collections activity or if regular payments are being received that could be used for a potential distribution.

Part 3 – Publication of disgorgement amounts and notice of claims process

Section 3 of the Proposed Rule requires the Commission to publish and update the amount of money it has received under disgorgement orders other than disgorgement orders arising from a contravention of the “insider trading and tipping” prohibitions under section 76 of the OSA. If a distribution is required, section 4 of the Proposed Rule requires the Commission to post a notice of the claims process.

Requiring the Commission to publish and update prescribed information on its website is a critical component of the new statutory distribution framework. Public access to this information will increase transparency and allow investors to stay informed about the status of amounts received and make claims at the appropriate time.

Part 4 – Requirement to update claims application

Sections 5 and 6 of the Proposed Rule set out the requirement for investors to update their claims applications. It is the investor's responsibility to ensure that the Commission or the administrator has correct and up-to-date information about their claim. The Commission may deny an investor's claim if the investor provides untrue or misleading information to the Commission.

Part 5 – Claims process if no court-appointed administrator

Similar to the SEC model, the OSA and the CFA provide that distributions may be carried out either by a court-appointed administrator or directly by the OSC. While the method of distribution will depend on the circumstances of the case, it is anticipated that most distributions will be conducted by a court-appointed administrator. Part 5 of the Proposed Rule sets out the process to be followed if there is no court-appointed administrator and a distribution is being carried out directly by the OSC.

Section 8 of the Proposed Rule describes the information that will be included in the notice of the claims process. This notice will provide investors with key information needed to make a claim, including a deadline to file a claim.

Section 9 of the Proposed Rule describes the requirements to file a claim. The Proposed Companion Policy provides guidance on the information applicants can expect to provide to support their claim. This information is important because the Proposed Rule's distribution process is claims-based and relies on harmed investors to submit information to prove their claims. Recall, disgorgement is a remedy focused on the amount obtained by the respondent as a result of the contravention. Disgorgement is not focused on “who lost what”. Accordingly, the information gathered by the Commission in the investigation or proceeding that led to the disgorgement order may not identify each harmed investor or substantiate their financial losses. Therefore, it is the investor's responsibility to provide their best information so the Commission can make determinations about claims.

There may be cases where, prior to commencing a claims process, the Commission has sufficient information to assess the financial losses sustained by particular investors. In these cases, the Commission may adapt the claim form to allow for a confirmation of claims process.²⁶ A confirmation of claims process is generally a simpler, more efficient, and less burdensome process for applicants.

²⁶ Under such a process, the claim form may invite an applicant to do one of the following: (1) confirm the accuracy and completeness of the claim amount assessed by the Commission, in which case no further documentary evidence will need to be submitted, (2) decline to make a claim, or (3) make a claim for a different amount, supported by documentation evidencing the amount claimed.

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Section 10 sets out how the Commission will determine whether to make a payment to an applicant and if so, the amount of the payment. Section 10 also sets out when payments will be prorated among eligible applicants, and when to decline making an individual payment on the basis that the amount is too small to justify the costs of paying the claim.

Investors who are eligible to receive payments under the Proposed Rule are not precluded from also seeking to recover their losses from other sources such as through filing a civil claim in court or making a complaint to the Ombudsman for Banking Services and Investments (**OBSI**). However, the Proposed Rule requires applicants to disclose any payments that have been or may be received from other sources to prevent double recovery.

Section 11 of the Proposed Rule provides applicants with the opportunity to file additional supporting documentation before the Commission denies all or part of a claim. Additional supporting documentation must be filed within the prescribed timeframe.

Subsection 12 (1) of the Proposed Rule provides that no payments shall be made until all claims filed under the Rule have been considered and the amount to be paid to each applicant has been determined. However, if there are any disputed claims, subsection 12 (2) allows the Commission to make partial installment payments to the remaining eligible applicants. In these cases, the Commission will hold back a portion of the disgorged amount in respect of the disputed claim.

Section 13 of the Proposed Rule deals with residual funds. It specifies that if there are funds that the Commission is unable to distribute, these funds will be dealt with in accordance with the provisions of the OSA, the CFA and the SCA.

Section 14 of the Proposed Rule allows the Commission to commence a direct claims process under Part 5 of the Proposed Rule and later apply to the court for the appointment of an administrator to complete the distribution. This flexibility to pivot after claims have been received is important in cases where the Commission did not originally have sufficient information about harmed investors and their estimated losses to determine the appropriate method to distribute the disgorged amount.

Part 6 – Administrative costs

The legislative amendments contemplate that certain administrative costs relating to distributions are eligible to be paid from the disgorged amount that is being distributed or, in accordance with the regulations, from other sanction and settlement money held by the Commission that has been allocated for this purpose.

For distributions carried out by a court-appointed administrator, administrative costs that are eligible for payment include the reasonable costs incurred by the administrator in carrying out the distribution.

For distributions carried out directly by the Commission in accordance with Part 5 of the Proposed Rule, administrative costs that are eligible for payment are confined to the reasonable costs of obtaining external advice relating to the distribution.

Sanction and settlement money that may be allocated by the Commission to pay the above-mentioned administrative costs includes:

- administrative penalties,
- settlement payments, and
- amounts disgorged to the Commission that are not subject to the distribution requirement.²⁷

These funds are held in a separate account by the Commission and may be allocated by the Commission for purposes authorized in subsection 19 (2) of the SCA. Currently, the Commission is authorized to allocate these funds: (1) to or for the benefit of third parties, (2) for use by the Commission or third parties for the purpose of educating investors or promoting or otherwise enhancing knowledge and information of persons regarding the operation of the securities and financial markets, or (3) for any other purpose specified in the regulations²⁸. The legislative amendments will add a new subclause to subsection 19 (2). This new subclause will authorize the Commission to allocate these funds to pay administrative costs in relation to the distribution of disgorged amounts under the new statutory distribution framework.

The Proposed Rule provides the framework for the payment of administrative costs for each distribution. This framework aims to minimize the amount of administrative costs being paid out of the disgorged amount being distributed. This benefits eligible investors by improving their recovery of financial losses from within the pool of funds being distributed. Specifically, section 15 provides that administrative costs for each distribution would be paid:

- (1) first, from the allocation of any administrative penalty or settlement money received by the Commission in relation to the same proceeding that gave rise to the disgorged amount that is being distributed,

²⁷ This may include administrative penalties, settlement payments and disgorged amounts held by the Commission prior to the coming into force of the legislative amendments, other than money the Commission has set aside for potential allocation to harmed investors.

²⁸ *Supra* note 10.

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- (2) next, from the allocation of other unrelated sanction and settlement money held by the Commission in such an amount as the Commission considers to be appropriate after considering a non-exhaustive list of factors, and
- (3) finally, if any administrative costs remain, from the disgorged amount that is being distributed.

Part 7 – Reporting

Section 16 of the Proposed Rule requires the Commission to publish a report on each completed distribution within a prescribed timeframe. These reports will promote transparency and awareness about the results of distributions being conducted under the new statutory distribution framework.

The Commission will monitor data relating to the administration of this framework and may consider future modifications to its approach, which could include future amendments to the Proposed Rule and/or Proposed Companion Policy.

Anticipated Costs and Benefits

Please refer to Annex E for the Commission's regulatory impact analysis of the Proposed Rule.

Alternatives Considered

No other alternatives were considered given that the legislative amendments require the regulations to establish a process to distribute disgorged funds to harmed investors. However, the Proposed Rule and the Proposed Companion Policy were informed by the distribution frameworks in the other jurisdictions set out above.

Reliance on Unpublished Studies

The Commission is not relying on any significant unpublished study, report, or other written material in connection with the Proposed Rule and the Proposed Companion Policy.

Rule-making Authority

The Commission's authority to make rules respecting the administration and distribution of disgorged amounts under section 128.1 of the OSA and section 60.2.1 of the CFA will be provided under paragraph 54.2 of subsection 143 (1) of the OSA and paragraph 40 of subsection 65 (1) of the CFA, respectively, following proclamation of this rulemaking authority.

The Commission's authority to make rules respecting the use of money described in subclause 19 (2) (b) (iii) or clause 19 (2) (c) of the SCA to pay administrative costs in relation to the distribution of disgorged amounts will be provided under paragraph 54.3 of subsection 143 (1) of the OSA and paragraph 41 of subsection 65 (1) of the CFA, respectively, following proclamation of this rulemaking authority.

Contents of Annexes

The following annexes form part of this Notice:

- Annex A – Proposed OSC Rule 11-502 *Distribution of Amounts Paid to the OSC under Disgorgement Orders*
- Annex B – Proposed Companion Policy 11-502 *Distribution of Amounts Paid to the OSC under Disgorgement Orders*
- Annex C – Proposed OSC Rule 11-503 (*Commodity Futures Act*) *Distribution of Amounts Paid to the OSC under Disgorgement Orders*
- Annex D – Proposed Companion Policy 11-503 (*Commodity Futures Act*) *Distribution of Amounts Paid to the OSC under Disgorgement Orders*
- Annex E – Regulatory Impact Analysis
- Annex F – Excerpts from Bill 146 with respect to amendments to the OSA, the CFA and the SCA

Request for Comments

We welcome your comments on the Proposed Rule and the Proposed Companion Policy.

Please submit your comments in writing on or before October 9, 2024. If you are sending your comments by email, you should also send an electronic file containing the submissions using Microsoft Word.

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Please send your comments to the following address:

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, Ontario M5H 3S8
Fax: 416-593-8122
Email: comments@osc.gov.on.ca

Comments received will be posted on the OSC website at www.osc.ca. Therefore, you should not include personal information directly in your comments. It is important that you state on whose behalf you are making the submission.

Content may be moderated so that all posts are respectful and professional.

Questions

Please refer your questions to:

Cullen Price
Manager
General Counsel's Department
(647) 501-8195
cprice@osc.gov.on.ca

Tara Lamacraft
Senior Legal Counsel
General Counsel's Department
(416) 263-7729
tlamacraft@osc.gov.on.ca

Namita Balgi
Senior Legal Counsel
General Counsel's Department
(416) 593-2371
nbalgi@osc.gov.on.ca

ANNEX A

PROPOSED OSC RULE 11-502
DISTRIBUTION OF AMOUNTS PAID TO THE OSC UNDER DISGORGEMENT ORDERS

PART 1
DEFINITIONS AND INTERPRETATION

Definitions

1. In this Instrument:

"administrator" means one or more persons or companies appointed by the Superior Court of Justice to administer and distribute all or any part of the disgorged amount under subsection 128.1 (4) of the *Securities Act*;

"approved claim amount" means, for each distribution, the total value of recognized direct financial losses of all persons or companies that filed claims and whose claims were approved by the Commission or the administrator, as the case may be;

"disgorgement order" means an order made under paragraph 10 of subsection 127 (1) or paragraph 15 of subsection 128 (3) of the *Securities Act*;

"eligible applicant" means a person or company that

- (a) incurred direct financial losses as a result of a contravention that gave rise to a disgorgement order, and
- (b) did not directly or indirectly engage in the contravention that gave rise to the disgorgement order.

PART 2
REQUIREMENT TO DISTRIBUTE

Circumstances where a distribution is required

2. (1) The distribution requirement in subsection 128.1 (2) of the *Securities Act* applies to money received by the Commission under a disgorgement order, other than in circumstances where any of the following apply:

- (a) the money has been received under a disgorgement order arising from a contravention of section 76 of the *Securities Act*;
- (b) in the opinion of the Commission, the costs of administering the distribution would not justify making the distribution given the value of the amount received under the disgorgement order and the number of potential eligible applicants.

(2) In circumstances where the Commission has received only part of the amount payable under the disgorgement order, the Commission must hold the amount for potential distribution to eligible applicants until the earlier of

- (a) 3 years from the date of the final disposition of the disgorgement order, and
- (b) the date that the Commission receives sufficient amounts under the disgorgement order to satisfy the threshold for distribution described in paragraph (b) of subsection (1).

(3) The Commission is not required to make a distribution if, after 3 years from the date of the final disposition of the disgorgement order, the amount received under the disgorgement order is insufficient to satisfy the threshold for distribution described in paragraph (b) of subsection (1).

(4) Despite subsection (3), the Commission may hold amounts received for potential future distribution to eligible applicants for a longer period if the Commission is of the opinion that sufficient additional amounts may be recovered within a reasonable timeframe to satisfy the threshold for distribution described in paragraph (b) of subsection (1) and if:

- (a) there is an ongoing action, application or other proceeding to recover additional amounts owing under the disgorgement order, or
- (b) the disgorgement order or a settlement or other agreement provides that payments under the disgorgement order may be made at a future date.

- (5) The final disposition of the disgorgement order described in subsections (2) and (3) begins on the later of
- (a) the expiry of the applicable time for the filing of an appeal of the proceeding in which the disgorgement order was issued, and
 - (b) the exhaustion of the appeal process if an appeal is filed.

**PART 3
PUBLICATION OF DISGORGEMENT AMOUNTS AND NOTICE OF CLAIMS PROCESS**

Publication of money received under disgorgement orders

3. (1) If the Commission receives money under a disgorgement order, other than a disgorgement order arising from a contravention of section 76 of the *Securities Act*, it must publish the amount of money received under the disgorgement order.
- (2) Information described in subsection (1) must be posted on the Commission's website and must be updated to include any additional amounts received under the disgorgement order within 30 days after the end of each calendar quarter.

Publication of notice of claims process

4. (1) If a distribution of money is required under this Instrument, notice of the claims process must be posted on the Commission's website and must set out the period within which an eligible applicant may file a claim.
- (2) An eligible applicant may file a claim by submitting an application in accordance with one of the following:
- (a) if there is an administrator, a claims process order made by the court;
 - (b) if there is no administrator, Part 5 of this Instrument.

**PART 4
REQUIREMENT TO UPDATE CLAIMS APPLICATION**

Requirement to update claims application

5. If a person or company has made an application for a payment as described in subsection 128.1 (3) of the *Securities Act*, and the information provided in the application changes in a material respect so that the information provided is now untrue or misleading or omits information that would make the information originally provided not untrue or misleading, the person or company must report the change to the Commission or the administrator promptly.

Claim denial – misleading or untrue information

6. The Commission may deny the claim for payment of a person or company if any of the following apply:
- (a) the person or company fails to comply with section 5;
 - (b) the person or company makes a statement or provides information to the Commission in their application that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement or information not misleading.

**PART 5
CLAIMS PROCESS IF NO COURT-APPOINTED ADMINISTRATOR**

Application

7. This Part applies if there is no administrator.

Content of the notice of claims process

8. (1) If there is no administrator, the notice described in section 4 must include all of the following information:
- (a) the proceeding under which the disgorgement order was made;
 - (b) the amount of money received under the disgorgement order;
 - (c) a statement that any eligible applicants are entitled to make a claim for payment from the disgorged amount;

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- (d) a description of how an eligible applicant can make a claim;
- (e) the final day for filing a claim, which must be at least 90 days from the date of the notice posted on the Commission's website in accordance with subsection 4 (1);
- (f) an address, including an electronic address, and telephone number to which inquiries about potential claims may be directed;
- (g) an address, including an electronic address, where claims should be filed;
- (h) a statement that a claim that does not comply with this Instrument will be denied;
- (i) a statement that, after the final day for filing a claim referred to in paragraph (e), the Commission may apply to the Superior Court of Justice to have an administrator appointed to distribute the disgorged amount instead of having the Commission distribute the amount in accordance with sections 10 to 13 of this Instrument, in which case, any claims received by the Commission on or before the final day for filing a claim referred to in paragraph (e), will be provided to the administrator to be administered in accordance with an order made by the court under subsection 128.1(4) of the *Securities Act*;
- (j) any other information that the Commission considers appropriate.

Claim requirements

9. (1) An applicant must use a claim form provided by the Commission.

(2) Unless the claim form provides otherwise, the claim must include a description of the direct financial loss incurred by the applicant and the amount claimed, supported by documentary evidence.

(3) The claim must identify any other sources from which payment for the amount claimed by the applicant under this section has been paid, is payable or may be payable to the applicant, and the amount of that payment.

(4) The claim must be filed on or before the final day for filing and must be updated in accordance with section 5.

Determining eligibility and amount of payment

10. (1) After reviewing all claims filed in accordance with section 9, the Commission may make a payment to the applicant from money received under a disgorgement order if the Commission is satisfied that all of the following apply:

- (a) the applicant is an eligible applicant in respect of the disgorgement order;
- (b) the amount of the applicant's direct financial loss can be quantified;
- (c) sufficient proof of the direct financial loss has been provided.

(2) When determining the amount to be paid to an eligible applicant, the Commission must consider all of the following:

- (a) the amount of money received under the disgorgement order;
- (b) the direct financial loss suffered by the eligible applicant;
- (c) the direct financial losses suffered by all eligible applicants;
- (d) any other information the Commission considers appropriate in the circumstances.

(3) When determining an applicant's direct financial loss for the purposes of this section, the Commission must not include any amount claimed by the applicant in respect of a loss of opportunity or interest on any loss, and must consider all of the following:

- (a) whether the applicant received or is entitled to receive a payment from other sources for the direct financial loss resulting from the contravention that gave rise to the disgorgement order;
- (b) whether the applicant benefitted from the contravention that gave rise to the disgorgement order.

(4) The Commission must prorate payments among eligible applicants if, having considered the matters under subsection (2), the Commission determines that the money the Commission received under the disgorgement order is insufficient to pay the approved claim amount.

(5) Even if an applicant is eligible to receive a payment in accordance with this section, the Commission may decline to make a payment to the applicant if, in the opinion of the Commission, the amount of the payment would be too small to justify the costs of paying it.

Opportunity to provide additional supporting documentation

11. (1) The Commission must not deny all or part of a claim without providing an applicant with a written notice and an opportunity to provide additional supporting documentation to substantiate their eligibility and any disputed amount, which must be filed by the applicant within 30 days from the date the notice was delivered.

(2) The notice in subsection (1) must be provided by the Commission by registered mail, courier, or electronic or digital transmission to the applicant's last known address, including electronic address, provided in the applicant's claim form.

(3) The notice in subsection (1) is deemed to have been delivered

- (a) by registered mail or courier, on the earlier of the date on the delivery receipt and the fifth day after sending, and
- (b) electronically or digitally, on the day of delivery.

No payment until all claims are determined

12. (1) No payments must be made to an eligible applicant until all the claims filed in accordance with section 9 have been considered and the amount to be paid to each eligible applicant is determined by the Commission under section 10.

(2) Despite subsection (1), if an applicant has filed additional supporting documentation in respect of a disputed claim in accordance with section 11, the Commission may hold back a portion of the disgorged amount in respect of the disputed claim and make partial installment payments to the remaining eligible applicants.

Residual funds

13. After 180 days following the date payments are issued to eligible applicants, if the Commission is unable to distribute an amount approved for payment to an eligible applicant, then the amount belongs to the Commission in accordance with subsection 128.1 (14) of the *Securities Act* and must be dealt with in accordance with subsection 19 (2) of the *Securities Commission Act, 2021*.

Election to seek appointment of administrator following final day for filing a claim

14. Despite sections 10 to 13 and following the final day for filing a claim specified in the notice in accordance with paragraph (e) of subsection 8 (1), the Commission may apply to the Superior Court of Justice for the appointment of an administrator to distribute the disgorged amount if the Commission considers that this would be appropriate given the nature or volume of claims received.

**PART 6
ADMINISTRATIVE COSTS**

Payment of administrative costs

15. (1) In this section:

"administrative costs" include any of the following costs referred to in subsections 128.1 (9) and (12) of the *Securities Act*:

- (a) reasonable costs incurred by an administrator, before their appointment, in connection with the disgorged amount;
- (b) reasonable costs incurred by an administrator in connection with court orders made under section 128.1 of the *Securities Act*;
- (c) reasonable costs incurred by the Commission to obtain external advice related to a distribution of the disgorged amount under Part 5 of this Instrument.

(2) The payment of administrative costs in relation to the distribution of disgorged amounts under subsection 128.1 (9) or (12) of the *Securities Act* must be made as follows:

- (a) first, from any administrative penalty or settlement money received by the Commission in relation to the same proceedings that gave rise to the disgorged amount that is the subject of the distribution, if such money has

been allocated for the purpose of paying such administrative costs under subclause 19 (2) (b) (iii) of the *Securities Commission Act, 2021*;

- (b) if any administrative costs remain after the payment described in paragraph (a), then from any other money that has been allocated by the Commission for the purpose of paying administrative costs under subclause 19 (2) (b) (iii) or clause 19 (2) (c) of the *Securities Commission Act, 2021* in such an amount as the Commission considers appropriate, having regard for the factors described in subsection (3);
- (c) if any administrative costs remain after the payments described in paragraphs (a) and (b), then from the disgorged amount that is the subject of the distribution.

(3) In determining the amount payable under paragraph (b) of subsection (2), the Commission must consider factors including but not limited to:

- (a) the balance of any amount allocated by the Commission for the purpose of paying administrative costs under subclause 19 (2) (b) (iii) or clause 19 (2) (c) of the *Securities Commission Act, 2021* that is available for such payments;
- (b) the amount of any payment already made under paragraph (a) of subsection (2);
- (c) the value of the disgorged amount that is the subject of the distribution;
- (d) the estimated financial losses of persons or companies that incurred direct financial losses as a result of the contravention giving rise to the payment of the disgorged amount, or the value of the approved claim amount, if, at the time the payment is made, the Commission or the administrator, as applicable, has determined that amount.

PART 7 REPORTING

Reporting

16. (1) The Commission must publish a report no later than 60 days after the date on which money received by the Commission under a disgorgement order is fully distributed.

(2) The report under subsection (1) must contain all of the following information:

- (a) the amount of money received by the Commission under the disgorgement order that was the subject of the distribution;
- (b) the method of distribution;
- (c) the estimated or total number of harmed investors, if known;
- (d) the total number of applicants;
- (e) the total number of eligible applicants who received a payment;
- (f) the total value of all approved claims;
- (g) the total amount distributed to eligible applicants;
- (h) the value of any administrative costs paid from the disgorged amount;
- (i) the percentage of each eligible applicant's approved claim amount paid under the distribution.

ANNEX B

PROPOSED COMPANION POLICY 11-502
DISTRIBUTION OF AMOUNTS PAID TO THE OSC UNDER DISGORGEMENT ORDERS

PART 1
GENERAL COMMENTS

Purpose of this Companion Policy

This Companion Policy sets out how the Ontario Securities Commission (the **Commission**) interprets and applies OSC Rule 11-502 *Distribution of Amounts Paid to the OSC under Disgorgement Orders* (the **Rule**) together with related provisions of the *Securities Act* (Ontario) (the **OSA**).

The Rule establishes the framework for distribution of money received by the Commission under disgorgement orders to investors who incurred direct financial losses as a result of a contravention of Ontario securities law. This framework includes:

- the circumstances in which money received by the Commission under disgorgement orders is required to be distributed;
- the eligibility requirements for investors seeking a payment from the disgorged amounts received by the Commission;
- a process for distributing disgorged amounts to harmed investors in cases where a court-appointed administrator is not used; and
- the use of other monetary sanctions and settlement payments received by the Commission to pay certain administrative costs in relation to the distribution of disgorged amounts.

To assist harmed investors, in addition to explaining how the Commission interprets and applies the provisions of the OSA and the Rule, this Companion Policy summarizes key aspects of the legislative framework and the Rule relating to distributions. This Companion Policy should be read together with the Rule and section 128.1 of the OSA. To the extent there is any conflict between this Companion Policy, the legislation and the Rule, the legislation and the Rule prevail.

Background

The Commission works to protect investors from unfair, improper or fraudulent practices; foster fair, efficient and competitive capital markets and confidence in capital markets; foster capital formation; and contribute to the stability of the financial system and the reduction of systemic risk. This mandate is achieved by administering and enforcing compliance with Ontario securities law.

When a person or company is alleged to have contravened Ontario securities law, the Commission may bring enforcement proceedings before the Capital Markets Tribunal (the **Tribunal**) or the courts. The Tribunal and the courts can impose various monetary and non-monetary sanctions. Where the Tribunal has made a finding or the court has made a declaration that a person or company has not complied with Ontario securities law, one of the orders they may make is an order that the person or company disgorge to the Commission any amounts obtained as a result of the non-compliance.ⁱ The Commission, exercising its prosecutorial discretion, selects cases, moves forward investigations, collects evidence, and calls witnesses as needed depending on the type of case being brought forward and the regulatory message being sent. Accordingly, a disgorgement order will not be applicable in all cases.

The primary purpose of a disgorgement order is not to compensate investors, but to prevent a wrong-doer from keeping amounts they obtained as a result of the misconduct. Disgorgement is distinct from restitution. Restitution is a remedy that aims to restore a person to the position they would have been in if not for the improper action of another.

The Commission makes reasonable efforts to collect monetary sanctions imposed by the Tribunal or the Superior Court of Justice, including collecting on disgorgement orders. In some situations, there may be little or no money, assets or property that can be seized for collections. However, to the extent the Commission can collect money under a disgorgement order, the OSA requires the Commission to distribute the money in accordance with the Rule to persons or companies who,

- incurred direct financial losses as a result of the contravention giving rise to the payment; and
- satisfy the conditions, restrictions and requirements set out in the Rule.ⁱⁱ

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The OSA provides that such distributions may be carried out in the following ways:

- by an administrator appointed by the Superior Court of Justice following a process established by the court, or
- directly by the Commission following a process set out in Part 5 of the Rule.ⁱⁱⁱ

The distribution process set out in the OSA is a claims-based process which relies on information submitted by applicants to prove their claims. Disgorgement is a remedy that focuses on the amount obtained by the respondent as a result of the contravention. The disgorgement remedy does not focus on “who lost what”. Accordingly, the Commission may not have information to substantiate financial losses incurred by specific harmed investors. Therefore, it is the applicant’s responsibility to provide their best information so that the Commission or administrator can make determinations about their claim.

Method of Distribution

There are two potential methods of distribution. The first involves the Commission seeking an administrator to be appointed by the court. The second is the Commission conducting a distribution directly under Part 5 of the Rule.

The method of distribution selected by the Commission will depend on the circumstances of each case. It is anticipated that most distributions will be conducted by an administrator. The Commission will generally carry out the distribution directly under Part 5 of the Rule only if the Commission is satisfied that:

- the potential applicants can be readily identified and are small in number, and
- their financial losses can be readily quantified.

The geographic location of potential applicants may also be a relevant consideration for choosing the method of distribution.

In cases where the Commission does not have sufficient information about potential applicants and their estimated losses to evaluate the appropriate method to distribute the disgorged amount, section 14 of the Rule allows the Commission to initiate the claims process under Part 5 of the Rule and later apply to the court for the appointment of an administrator to complete the distribution. It is expected that the Commission would rely on section 14 when appropriate, based on the nature or volume of the claims received. For example, the claims submitted to the Commission may indicate that there is a high volume of claims or complex issues that are better dealt with by an administrator.

Section 1 - Definitions

Unless defined in the Rule, terms used in the Rule and in this Companion Policy have the meaning given to them in securities legislation, including, for greater certainty, in OSC Rule 14-501 *Definitions*.

Definition of Eligible Applicant***Persons or companies***

Investors who are eligible for a payment from the disgorged amount received by the Commission are referred to in the Rule as “eligible applicants”. The definition of an eligible applicant includes any person or company that incurred direct financial losses as a result of a contravention that gave rise to a disgorgement order provided that the person or company did not directly or indirectly participate in the conduct that resulted in the disgorgement order.

Eligible applicants can submit claims even if they were not identified in the course of the underlying enforcement investigation or proceeding. An eligible applicant will generally be a person or company that was harmed during the relevant time period when the contravention took place. This time period is typically defined in the relevant decision or settlement agreement accompanying the disgorgement order.

Direct financial losses

The Rule deals with contraventions that were found in proceedings or identified in settlement agreements that gave rise to disgorgement orders. Only financial losses that were directly caused by these contraventions are eligible for payment.

What constitutes a “direct financial loss” may depend on the nature of the contravention. For example:

- in a case where the underlying contravention involved a fraudulent investment scheme, a direct financial loss might include any of the amount invested in the scheme and any related fees the investor paid to the respondent (other than amounts that were repaid to the investor). However, indirect financial losses incurred by investors in this scheme, such as expenses incurred by withdrawing from a different investment in order to invest in the scheme, would not be eligible for payment from the disgorged amount.

- in other cases, an investor's "direct financial loss" could be confined to a fee paid by the investor to a respondent that the investor should not have paid, or was in excess of what they should have paid, due to conduct of the respondent such as a failure to maintain proper internal controls.

Types of losses that are not eligible for payment include:

- financial losses relating to conduct that was not proven in the proceeding (for example, financial losses resulting solely from a decrease in the value of an investment that is unrelated to the respondent's contravention),
- financial losses relating to conduct occurring outside of the relevant time period considered in the proceeding,
- financial losses relating to the loss of an opportunity,
- interest on any financial loss, and
- non-financial losses.

PART 2 REQUIREMENT TO DISTRIBUTE

Subsection 2 (1) - Circumstances where a distribution is required

The Rule provides that money received by the Commission under a disgorgement order must be distributed in circumstances other than where any of the following apply:

- the disgorgement was ordered in relation to a contravention of the prohibition against "insider trading and tipping" under section 76 of the OSA;
- the amount received is too small to justify the costs of distributing it.

Money received by the Commission that fits within these exceptions will be dealt with in accordance with subsection 19 (2) of the *Securities Commission Act, 2021* (the **SCA**), which limits the use of these funds to specific purposes.^{iv}

Subsections 2 (2) to (5) - Partial amounts received

The Commission's approach to dealing with partial amounts received under a disgorgement order will vary depending on the particular circumstances of a case. Whether to distribute, hold, or not distribute these funds will depend on details such as the following:

- the amount received,
- the status of any steps taken by the Commission to recover additional amounts owing under the order,
- whether the order or an agreement such as a payment plan provides that payments under the order may be made at a future date, and
- the time that has passed from either the date of the final disposition of the order, or if the order has been appealed, the date the appeal was resolved.

The Commission makes reasonable efforts to enforce Tribunal and court orders, including collecting unpaid monetary sanctions and costs. Tribunal orders are routinely filed in the Superior Court of Justice. Under Ontario securities law, Tribunal orders then become enforceable as though they are court orders. This allows the Commission to use a range of creditor remedies to collect amounts owing, which can include garnishment, seizure and sale of property, and registering liens. It is important to note that in these circumstances the Commission becomes an ordinary creditor of the respondent. There is no guarantee that any funds, assets, or property may be realized through creditor remedies. In addition, any funds, assets or property may be shared with other creditors based on any creditor priorities.

There may be situations where the Commission has received only part of the amount payable under the disgorgement order and that amount is not sufficient to justify the costs of administering a distribution. In these cases, the Rule requires the Commission to hold the amount received for potential distribution to eligible applicants until the earlier of 3 years from the date of the final disposition of the disgorgement order and the date that the Commission receives sufficient amounts under the disgorgement order to justify the costs of a distribution. In circumstances where the disgorgement order has been appealed, this 3-year period runs from the date the appeal has been resolved.

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During this 3-year period, the Commission may receive a partial amount under the disgorgement order that meets the threshold for carrying out a distribution. In these cases, the Commission may consider the following factors before deciding whether to proceed with a distribution or hold the funds for an additional period to allow for further amounts to be recovered:

- the status of any ongoing collection efforts,
- the timing and amount of any future payments that are anticipated to be received under the terms of the order or a payment plan, and
- the anticipated costs of carrying out one or more distributions.

Following this 3-year period, the Commission may not recover sufficient amounts under the order to justify the costs of administering a distribution. In this case, the Rule provides that the Commission is not required to distribute the disgorged amount. However, there may be situations where there is ongoing collections activity at the end of this 3-year period. For example, there may be a court proceeding to recover additional amounts owing under the order. In these cases, the Rule provides the Commission with discretion to continue to hold amounts received for potential future distribution to eligible applicants beyond the 3-year period. The Commission may do this if it is of the opinion that sufficient additional amounts may be recovered within a reasonable timeframe that would satisfy the threshold for carrying out a distribution.

Similarly, there may be occasions where the order or a payment plan provides that payments under the order may be made at a future date beyond the 3-year period. In these situations, the Commission may decide to continue to hold the amounts received for potential future distribution to eligible applicants. The Commission may do this if it is of the opinion that sufficient additional amounts may be recovered within a reasonable timeframe that would satisfy the threshold for carrying out a distribution.

**PART 3
PUBLICATION OF DISGORGEMENT AMOUNTS AND NOTICE OF CLAIMS PROCESS**

Part 3 of the Rule involves two distinct steps. The first step is the publication of disgorged amounts received by the Commission. The second step is the publication of the notice of claims process.

Section 3 - Publication of money received under disgorgement orders

Except in the case of money received in relation to the insider trading and tipping prohibitions under section 76 of the OSA, for each case where disgorgement is ordered, amounts received by the Commission under that order will be published on its website and updated to include additional amounts received within 30 days after the end of each calendar quarter (March 31, June 30, September 30 and December 31). As part of these quarterly updates, additional information relevant to the distribution will be added as it becomes available. Information published on the website will generally include:

- the proceeding under which the disgorgement order was made and the respondent(s) to that proceeding who are subject to that order;
- the amount owing individually and/or jointly by the respondents under the disgorgement orders, the amount received by the Commission, and any amounts outstanding in respect of these orders; and
- any other information the Commission considers appropriate.

Section 4 - Publication of notice of claims process

The Rule requires that a notice relating to how a distribution will be carried out will be published on the Commission's website, including information about how eligible applicants can make a claim and the deadline by which claims must be filed to be considered. In addition, the Commission may look to amplify the website posting through additional channels such as through press releases, social media channels, and investor advocacy organizations.

If the distribution is being carried out directly by the Commission under Part 5 of the Rule, the Commission will also attempt to send the notice to the last known address (including an electronic address), if available, of any known potential eligible applicants.

If the distribution is being carried out by an administrator, any additional notice requirements will be specified in the claims process order established by the court.

**PART 4
REQUIREMENT TO UPDATE CLAIMS APPLICATION**

Sections 5 and 6 - Requirement to update claims application

It is the applicant's responsibility to ensure that the Commission or the administrator has correct and up-to-date information about the claim.

Under a distribution carried out by the Commission under Part 5 of the Rule, a claim may be denied if any of the following apply:

- the person or company fails to promptly report any changes to the information provided in their application if the information changes in a material respect so that the information provided is now untrue or misleading or omits information that would make the information originally provided not untrue or misleading;
- the person or company makes a statement or provides information to the Commission in their application that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement or information not misleading.

**PART 5
CLAIMS PROCESS IF NO COURT-APPOINTED ADMINISTRATOR**

Section 7 – Application

Part 5 of the Rule applies if there is no administrator.

Section 8 - Contents of the notice of claims process

If the Commission elects to directly distribute money it has received under a disgorgement order using the process set out in Part 5 of the Rule, the Commission will publish a notice on its website explaining how eligible applicants can make a claim. This notice will include important information such as the name of the proceeding under which the disgorgement order was made, the amount that is being distributed, and the deadline for eligible applicants to file claims.

Applicants will generally have the option to either file claims electronically or using a paper form provided by the Commission. Applicants will have at least 90 days from the date of the notice to make a claim. Any claim filed after the final day for filing a claim specified in the notice will not be considered.

While this minimum 90-day period may allow simpler distributions to be completed relatively quickly, the Commission may set a period longer than 90 days depending on the circumstances of the case. For example, the Commission may establish a longer claims period if the Commission has limited information about potential applicants or if potential applicants are located outside of Canada.

If at the time the notice is posted, the amount received under the disgorgement order does not represent the full amount payable under the order, any additional amounts received under the order prior to the conclusion of the distribution will be included in the distribution.

Section 9 - Claim requirements

The claim form will be available on the Commission's website. Although the claim form may differ somewhat depending on the case, at a minimum, applicants can expect to provide the following information and documentary evidence to support their claim:

- applicant's name, address and contact information;
- information about the claim, including:
 - the applicant's direct financial losses and the amount claimed;
 - how the applicant believes the contraventions that gave rise to the disgorgement order directly resulted in the financial losses claimed by the applicant;
 - any amounts received from the relevant investment (e.g., dividends, interest income, capital gains, return of capital, etc.);
 - any other sources (e.g., other litigation action) from which payment for the loss claimed has been paid, is payable or may be payable to the applicant, and the amount of that payment;
 - the applicant's involvement in the misconduct, if any;
 - whether the Commission has ever denied the applicant's claim for this or any other loss;
- documentary evidence to support the claim such as account statements, records of wire or e-transfers, investment agreements, etc.;

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- applicant's certification that the information in the form and where applicable, material submitted in support of the claim, is true and correct;
- updates to the information that has been provided to the Commission if there have been any changes;
- applicant's certification that they understand that after the final day for filing a claim, the Commission may apply to the Superior Court of Justice to have an administrator appointed to distribute the disgorged amount. In this case, any claims received by the Commission on or before the final day for filing will be provided to the administrator to be administered under an order made by the court.

As noted above, it is the applicant's responsibility to provide their best information so that the Commission can make determinations about the claim. However, there may be cases where, prior to commencing a claims process, the Commission has sufficient information to assess the financial losses sustained by particular investors who were harmed by the conduct giving rise to the disgorgement order. In these cases, the claim form may invite applicants to do one of the following:

- confirm the accuracy and completeness of the claim amount assessed by the Commission, in which case no further documentary evidence will need to be submitted,
- decline to make a claim, or
- make a claim for a different amount, supported by documentation evidencing the amount claimed.

Section 10 - Determining eligibility and amount of payment***Subsections 10 (1) to (3) - Claim Determinations***

After reviewing all claims filed under Part 5 of the Rule, the Commission will make claim determinations under section 10 of the Rule. The Commission will make these determinations after considering recommendations from Commission staff who will review all claims.

The Commission may make a payment to the applicant if the Commission is satisfied that all of the following apply:

- the applicant is an eligible applicant in respect of the disgorgement order;
- the amount of the applicant's direct financial loss can be quantified;
- sufficient proof of the direct financial loss has been provided.

When determining the amount to be paid to the eligible applicant, the Commission must consider all of the following:

- the amount of money received under the disgorgement order;
- the direct financial loss suffered by the eligible applicant;
- the direct financial losses suffered by all eligible applicants;
- any other information the Commission considers appropriate in the circumstances.

When determining an applicant's direct financial loss for the purposes of section 10, the Commission must not include any amount claimed by the applicant in respect of a loss of opportunity or interest on any loss, and must consider all of the following:

- whether the applicant received or is entitled to receive a payment from other sources for the direct financial loss resulting from the contravention that gave rise to the disgorgement order;
- whether the applicant benefitted from the contravention that gave rise the disgorgement order.

The Commission's practice will be to communicate the outcomes of its determinations to applicants in writing.

Subsection 10 (4) - Prorated payments

The Commission's practice will be to use the following formula to prorate payments under subsection 10 (4) of the Rule:

$$\frac{A \times B}{C}$$

where

A = the amount of money received by the Commission under the order less any administrative costs that have been deducted from the disgorged amount,

B = the financial loss suffered by the eligible applicant, and

C = the financial loss suffered by all eligible applicants.

Subsection 10 (5) - Exception

The Commission may decline to make a payment to an eligible applicant if, in the opinion of the Commission, the amount of the payment would be too small to justify the costs of making the payment. While the Commission has not established any specific monetary cut-off for declining payments, which may depend on the circumstances of the case, it is anticipated that payments of less than \$50 will generally not be issued. In circumstances where the Commission declines to issue a payment to an eligible applicant under this subsection of the Rule, the amount that would have otherwise been payable to the applicant will be added back to the amount available for distribution to the remaining eligible applicants.

Section 11 - Opportunity to provide additional supporting documentation

Before the Commission denies all or part of a claim, the Commission will provide applicants with the opportunity to provide additional supporting documentation to substantiate their eligibility and any disputed amount. The Commission will provide the notice in writing and the applicant will have 30 days from the date the notice was delivered to file the additional supporting documentation.

Section 12 - No payment until all claims are determined

Subsection 12 (1) of the Proposed Rule provides that no payments shall be made until all claims filed under the Rule have been considered and the amount to be paid to each applicant has been determined. However, if there are any disputed claims, subsection 12 (2) allows the Commission to make partial installment payments to the remaining eligible applicants. In these cases, the Commission will hold back a portion of the disgorged amount in respect of the disputed claim.

Section 13 - Residual funds

In practice, in circumstances where payments are made by cheque, the Commission will undertake reasonable efforts to contact the eligible applicants who have not deposited their cheques after 90 days following the issuance of the cheque. The purpose of the Commission's efforts to contact these eligible applicants is to ensure that they have a reasonable opportunity to participate in the distribution. Approved claim amounts that the Commission is unable to distribute to eligible applicants after 180 days following the date payments are issued will be dealt with in accordance with subsection 19 (2) of the SCA^y.

Section 14 - Election to seek appointment of administrator following final day for filing a claim

There may be cases where the Commission does not have sufficient information about potential applicants and their estimated losses to evaluate the appropriate method to distribute the disgorged amount. In these cases, the Commission may initiate the claims process under Part 5 of the Rule and later apply to the court for the appointment of an administrator to complete the distribution. The approach taken will depend on the nature or volume of the claims received by the Commission, and may take into account factors such as:

- the number of claims received,
- the volume and complexity of the documentation that must be reviewed to evaluate the claims,
- the location of the applicants,
- any special requirements of applicants (for example, language requirements), and
- the resources and expertise required to conduct the distribution.

If the Commission seeks to have an administrator appointed to complete a distribution that was initiated under Part 5 of the Rule, the distribution will be governed by the court's claims process order instead of the Rule. In these circumstances, the Commission will give the administrator any information that was received from applicants following the initiation of the claims process.

PART 6 ADMINISTRATIVE COSTS

Section 15 - Payment of administrative costs

The OSA contemplates that certain administrative costs relating to distributions are eligible to be paid from the disgorged amount that is being distributed or, in accordance with the regulations, from other sanction and settlement money held by the Commission that it has allocated for this purpose. These costs include the reasonable costs incurred by an administrator in carrying out a distribution,^{vi} or in the case of a distribution carried out directly by the Commission under the Rule, reasonable costs incurred by the Commission in obtaining external advice relating to the distribution^{vii}.

The sanction and settlement money that may be allocated by the Commission to pay these administrative costs includes administrative penalties, settlement payments, and amounts disgorged to the Commission that are not subject to the distribution requirement. These funds are held in a separate account by the Commission. The Commission's practice is to set aside funds held in this account for various purposes authorized under subsection 19 (2) of the SCA on an annual basis. In keeping with this practice, the Commission may set aside some of these funds for potential use toward the payment of eligible administrative costs relating to distributions.

The Rule provides that for each distribution, administrative costs will be paid:

- (1) First, from any administrative penalty or settlement money received by the Commission in relation to the same proceeding as the disgorged amount that is the subject of the distribution.
- (2) Next, from other unrelated sanction and settlement money the Commission has set aside for potential payment of such costs, as described above, and in such an amount the Commission considers appropriate after considering factors including:
 - the balance of funds set aside by the Commission for the purpose of paying administrative costs that is available for such payments,
 - the amount of any administrative costs that have already been paid from administrative penalty or settlement money received by the Commission in relation the same proceeding as the disgorged amount that is the subject of the distribution,
 - the value of the disgorged amount that is the subject of the distribution, and
 - the estimated financial losses incurred by potential applicants as a result of the relevant contravention or the value of the approved claim amount if that amount has been determined by the Commission or the administrator.
- (3) Finally, if any administrative costs remain, from the disgorged amount that is being distributed.

PART 7 REPORTING

Section 16 - Reporting

The Rule provides that the Commission will publish a report no later than 60 days following the conclusion of the distribution. This report will describe the results of the distribution. It will include data such as the percentage of each eligible applicant's approved claim amount paid under the distribution. The Commission's practice will be to anonymize any such data.

i The Tribunal's authority to make an order requiring a person or company to disgorge to the Commission any amounts obtained as a result of non-compliance with Ontario securities law is found in paragraph 10 of subsection 127 (1) of the OSA. The authority of the Ontario Superior Court of Justice to make an order requiring a person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance with Ontario securities law is found in paragraph 15 of subsection 128 (3) of the OSA.

In some cases, the Commission may lay quasi-criminal charges and prosecute alleged wrongdoers through the Ontario Court of Justice under section 122 of the OSA, which may result in a fine or imprisonment on conviction. Any such fine is not subject to the distribution framework under the Rule.

ii The legislative framework for distributing money disgorged to the Commission is found in section 128.1 of the OSA.

iii Subsections 128.1 (4) and (10) of the OSA set out the two methods of distribution.

iv Subsection 128.1 (15) of the OSA provides that if the regulations do not require a distribution, the disgorged amount belongs to the Commission and shall be dealt with in accordance with subsection 19 (2) of the SCA.

Subsection 19 (2) of the SCA allows the Commission to allocate this money for the following purposes:

- (i) to or for the benefit of third parties,
- (ii) for use by the Commission or third parties for the purpose of educating investors or promoting or otherwise enhancing knowledge and information of persons regarding the operation of the securities and financial markets,

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- (iii) for use to pay administrative costs in relation to the distribution of disgorged amounts in accordance with subsection 128.1 (9) or (12) of the OSA, or
 - (iv) for any other purpose specified in the regulations. Purposes specified in O. Reg. 28/24 include certain technology and data enhancement expenditures of the Commission and funding activities of the Commission's Office of Economic Growth and Innovation.
- v Subsection 128.1 (14) of the OSA provides that any disgorged amount remaining after payments are made to the applicants and towards administrative costs of the distribution belongs to the Commission and shall be dealt with in accordance with subsection 19 (2) of the SCA. See Endnote iv for information on limits to the use of funds under subsection 19 (2) of the SCA.
- vi Subsection 128.1 (9) of the OSA describes the administrative costs that are eligible for payment from other sanction and settlement money held by the Commission and described in subclause 19 (2) (b) (iii) or clause 19 (2) (c) of the SCA where the distribution is carried out by an administrator.
- vii Subsection 128.1 (12) of the OSA describes the administrative costs that are eligible for payment from other sanction and settlement money held by the Commission and described in subclause 19 (2) (b) (iii) or clause 19 (2) (c) of the SCA where the distribution is carried out by the Commission following the process established under the Rule.

ANNEX C

PROPOSED OSC RULE 11-503
(COMMODITY FUTURES ACT) DISTRIBUTION OF AMOUNTS PAID TO THE OSC UNDER DISGORGEMENT ORDERS

PART 1
DEFINITIONS AND INTERPRETATION

Definitions

1. In this Instrument:

"administrator" means one or more persons or companies appointed by the Superior Court of Justice to administer and distribute all or any part of the disgorged amount under subsection 60.2.1(4) of the *Commodity Futures Act*;

"approved claim amount" means, for each distribution, the total value of recognized direct financial losses of all persons or companies that filed claims and whose claims were approved by the Commission or the administrator, as the case may be;

"disgorgement order" means an order made under paragraph 10 of subsection 60 (1) or paragraph 11 of subsection 60.2 (3) of the *Commodity Futures Act*;

"eligible applicant" means a person or company that

- (a) incurred direct financial losses as a result of a contravention that gave rise to a disgorgement order, and
- (b) did not directly or indirectly engage in the contravention that gave rise to the disgorgement order.

PART 2
REQUIREMENT TO DISTRIBUTE

Circumstances where a distribution is required

2. (1) The distribution requirement in subsection 60.1 (2) of the *Commodity Futures Act* applies to money received by the Commission under a disgorgement order, other than in circumstances where in the opinion of the Commission, the costs of administering the distribution would not justify making the distribution given the value of the amount received under the disgorgement order and the number of potential eligible applicants.

(2) In circumstances where the Commission has received only part of the amount payable under the disgorgement order, the Commission must hold the amount for potential distribution to eligible applicants until the earlier of

- (a) 3 years from the date of the final disposition of the disgorgement order, and
- (b) the date that the Commission receives sufficient amounts under the disgorgement order to satisfy the threshold for distribution described in subsection (1).

(3) The Commission is not required to make a distribution if, after 3 years from the date of the final disposition of the disgorgement order, the amount received under the disgorgement order is insufficient to satisfy the threshold for distribution described in subsection (1).

(4) Despite subsection (3), the Commission may hold amounts received for potential future distribution to eligible applicants for a longer period if the Commission is of the opinion that sufficient additional amounts may be recovered within a reasonable timeframe to satisfy the threshold for distribution described in subsection (1) and if:

- (a) there is an ongoing action, application or other proceeding to recover additional amounts owing under the disgorgement order, or
- (b) the disgorgement order or a settlement or other agreement provides that payments under the disgorgement order may be made at a future date.

(5) The final disposition of the disgorgement order described in subsections (2) and (3) begins on the later of

- (a) the expiry of the applicable time for the filing of an appeal of the proceeding in which the disgorgement order was issued, and
- (b) the exhaustion of the appeal process if an appeal is filed.

**PART 3
PUBLICATION OF DISGORGEMENT AMOUNTS AND NOTICE OF CLAIMS PROCESS**

Publication of money received under disgorgement orders

3. (1) If the Commission receives money under a disgorgement order, it must publish the amount of money received under the disgorgement order.

(2) Information described in subsection (1) must be posted on the Commission's website and must be updated to include any additional amounts received under the disgorgement order within 30 days after the end of each calendar quarter.

Publication of notice of claims process

4. (1) If a distribution of money is required under this Instrument, notice of the claims process must be posted on the Commission's website and must set out the period within which an eligible applicant may file a claim.

(2) An eligible applicant may file a claim by submitting an application in accordance with one of the following:

- (a) if there is an administrator, a claims process order made by the court;
- (b) if there is no administrator, Part 5 of this Instrument.

**PART 4
REQUIREMENT TO UPDATE CLAIMS APPLICATION**

Requirement to update claims application

5. If a person or company has made an application for a payment as described in subsection 60.2.1 (3) of the *Commodity Futures Act*, and the information provided in the application changes in a material respect so that the information provided is now untrue or misleading or omits information that would make the information originally provided not untrue or misleading, the person or company must report the change to the Commission or the administrator promptly.

Claim denial – misleading or untrue information

6. The Commission may deny the claim for payment of a person or company if any of the following apply:

- (a) the person or company fails to comply with section 5;
- (b) the person or company makes a statement or provides information to the Commission in their application that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement or information not misleading.

**PART 5
CLAIMS PROCESS IF NO COURT-APPOINTED ADMINISTRATOR**

Application

7. This Part applies if there is no administrator.

Content of the notice of claims process

8. (1) If there is no administrator, the notice described in section 4 must include all of the following information:

- (a) the proceeding under which the disgorgement order was made;
- (b) the amount of money received under the disgorgement order;
- (c) a statement that any eligible applicants are entitled to make a claim for payment from the disgorged amount;
- (d) a description of how an eligible applicant can make a claim;
- (e) the final day for filing a claim, which must be at least 90 days from the date of the notice posted on the Commission's website in accordance with subsection 4 (1);
- (f) an address, including an electronic address, and telephone number to which inquiries about potential claims may be directed;

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- (g) an address, including an electronic address, where claims should be filed;
- (h) a statement that a claim that does not comply with this Instrument will be denied;
- (i) a statement that, after the final day for filing a claim referred to in paragraph (e), the Commission may apply to the Superior Court of Justice to have an administrator appointed to distribute the disgorged amount instead of having the Commission distribute the amount in accordance with sections 10 to 13 of this Instrument, in which case, any claims received by the Commission on or before the final day for filing a claim referred to in paragraph (e), will be provided to the administrator to be administered in accordance with an order made by the court under subsection 60.2.1 (4) of the *Commodity Futures Act*;
- (j) any other information that the Commission considers appropriate.

Claim requirements

9. (1) An applicant must use a claim form provided by the Commission.

(2) Unless the claim form provides otherwise, the claim must include a description of the direct financial loss incurred by the applicant and the amount claimed, supported by documentary evidence.

(3) The claim must identify any other sources from which payment for the amount claimed by the applicant under this section has been paid, is payable or may be payable to the applicant, and the amount of that payment.

(4) The claim must be filed on or before the final day for filing and must be updated in accordance with section 5.

Determining eligibility and amount of payment

10. (1) After reviewing all claims filed in accordance with section 9, the Commission may make a payment to the applicant from money received under a disgorgement order if the Commission is satisfied that all of the following apply:

- (a) the applicant is an eligible applicant in respect of the disgorgement order;
- (b) the amount of the applicant's direct financial loss can be quantified;
- (c) sufficient proof of the direct financial loss has been provided.

(2) When determining the amount to be paid to an eligible applicant, the Commission must consider all of the following:

- (a) the amount of money received under the disgorgement order;
- (b) the direct financial loss suffered by the eligible applicant;
- (c) the direct financial losses suffered by all eligible applicants;
- (d) any other information the Commission considers appropriate in the circumstances.

(3) When determining an applicant's direct financial loss for the purposes of this section, the Commission must not include any amount claimed by the applicant in respect of a loss of opportunity or interest on any loss, and must consider all of the following:

- (a) whether the applicant received or is entitled to receive a payment from other sources for the direct financial loss resulting from the contravention that gave rise to the disgorgement order;
- (b) whether the applicant benefitted from the contravention that gave rise to the disgorgement order.

(4) The Commission must prorate payments among eligible applicants if, having considered the matters under subsection (2), the Commission determines that the money the Commission received under the disgorgement order is insufficient to pay the approved claim amount.

(5) Even if an applicant is eligible to receive a payment in accordance with this section, the Commission may decline to make a payment to the applicant if, in the opinion of the Commission, the amount of the payment would be too small to justify the costs of paying it.

Opportunity to provide additional supporting documentation

11. (1) The Commission must not deny all or part of a claim without providing an applicant with a written notice and an opportunity to provide additional supporting documentation to substantiate their eligibility and any disputed amount, which must be filed by the applicant within 30 days from the date the notice was delivered.

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(2) The notice in subsection (1) must be provided by the Commission by registered mail, courier, or electronic or digital transmission to the applicant's last known address, including electronic address, provided in the applicant's claim form.

(3) The notice in subsection (1) is deemed to have been delivered

- (a) by registered mail or courier, on the earlier of the date on the delivery receipt and the fifth day after sending, and
- (b) electronically or digitally, on the day of delivery.

No payment until all claims are determined

12. (1) No payments must be made to an eligible applicant until all the claims filed in accordance with section 9 have been considered and the amount to be paid to each eligible applicant is determined by the Commission under section 10.

(2) Despite subsection (1), if an applicant has filed additional supporting documentation in respect of a disputed claim in accordance with section 11, the Commission may hold back a portion of the disgorged amount in respect of the disputed claim and make partial installment payments to the remaining eligible applicants.

Residual funds

13. After 180 days following the date payments are issued to eligible applicants, if the Commission is unable to distribute an amount approved for payment to an eligible applicant, then the amount belongs to the Commission in accordance with subsection 60.2.1 (14) of the *Commodity Futures Act* and must be dealt with in accordance with subsection 19 (2) of the *Securities Commission Act, 2021*.

Election to seek appointment of administrator following final day for filing a claim

14. Despite sections 10 to 13 and following the final day for filing a claim specified in the notice in accordance with paragraph (e) of subsection 8 (1), the Commission may apply to the Superior Court of Justice for the appointment of an administrator to distribute the disgorged amount if the Commission considers that this would be appropriate given the nature or volume of claims received.

**PART 6
ADMINISTRATIVE COSTS**

Payment of administrative costs

15. (1) In this section:

"administrative costs" include any of the following costs referred to in subsections 60.2.1 (9) and (12) of the *Commodity Futures Act*:

- (a) reasonable costs incurred by an administrator, before their appointment, in connection with the disgorged amount;
- (b) reasonable costs incurred by an administrator in connection with court orders made under section 60.2.1 of the *Commodity Futures Act*;
- (c) reasonable costs incurred by the Commission to obtain external advice related to a distribution of the disgorged amount under Part 5 of this Instrument.

(2) The payment of administrative costs in relation to the distribution of disgorged amounts under subsection 60.2.1 (9) or (12) of the *Commodity Futures Act* must be made as follows:

- (a) first, from any administrative penalty or settlement money received by the Commission in relation to the same proceedings that gave rise to the disgorged amount that is the subject of the distribution, if such money has been allocated for the purpose of paying such administrative costs under subclause 19 (2) (b) (iii) of the *Securities Commission Act, 2021*;
- (b) if any administrative costs remain after the payment described in paragraph (a), then from any other money that has been allocated by the Commission for the purpose of paying administrative costs under subclause 19 (2) (b) (iii) or clause 19 (2) (c) of the *Securities Commission Act, 2021* in such an amount as the Commission considers appropriate, having regard for the factors described in subsection (3);
- (c) if any administrative costs remain after the payments described in paragraphs (a) and (b), then from the disgorged amount that is the subject of the distribution.

(3) In determining the amount payable under paragraph (b) of subsection (2), the Commission must consider factors including but not limited to:

- (a) the balance of any amount allocated by the Commission for the purpose of paying administrative costs under subclause 19 (2) (b) (iii) or clause 19 (2) (c) of the *Securities Commission Act, 2021* that is available for such payments;
- (b) the amount of any payment already made under paragraph (a) of subsection (2);
- (c) the value of the disgorged amount that is the subject of the distribution;
- (d) the estimated financial losses of persons or companies that incurred direct financial losses as a result of the contravention giving rise to the payment of the disgorged amount, or the value of the approved claim amount, if, at the time the payment is made, the Commission or the administrator, as applicable, has determined that amount.

PART 7 REPORTING

Reporting

16. (1) The Commission must publish a report no later than 60 days after the date on which money received by the Commission under a disgorgement order is fully distributed.

(2) The report under subsection (1) must contain all of the following information:

- (a) the amount of money received by the Commission under the disgorgement order that was the subject of the distribution;
- (b) the method of distribution;
- (c) the estimated or total number of harmed investors, if known;
- (d) the total number of applicants;
- (e) the total number of eligible applicants who received a payment;
- (f) the total value of all approved claims;
- (g) the total amount distributed to eligible applicants;
- (h) the value of any administrative costs paid from the disgorged amount;
- (i) the percentage of each eligible applicant's approved claim amount paid under the distribution.

ANNEX D

PROPOSED COMPANION POLICY 11-503
(COMMODITY FUTURES ACT) DISTRIBUTION OF AMOUNTS PAID TO THE OSC UNDER DISGORGEMENT ORDERS

PART 1
GENERAL COMMENTS

Purpose of this Companion Policy

This Companion Policy sets out how the Ontario Securities Commission (the **Commission**) interprets and applies OSC Rule 11-503 (*Commodity Futures Act*) *Distribution of Amounts Paid to the OSC under Disgorgement Orders* (the **Rule**) together with related provisions of the *Commodity Futures Act* (Ontario) (the **CFA**).

The Rule establishes the framework for distribution of money received by the Commission under disgorgement orders to investors who incurred direct financial losses as a result of a contravention of Ontario commodity futures law. This framework includes:

- the circumstances in which money received by the Commission under disgorgement orders is required to be distributed;
- the eligibility requirements for investors seeking a payment from the disgorged amounts received by the Commission;
- a process for distributing disgorged amounts to harmed investors in cases where a court-appointed administrator is not used; and
- the use of other monetary sanctions and settlement payments received by the Commission to pay certain administrative costs in relation to the distribution of disgorged amounts.

To assist harmed investors, in addition to explaining how the Commission interprets and applies the provisions of the CFA and the Rule, this Companion Policy summarizes key aspects of the legislative framework and the Rule relating to distributions. This Companion Policy should be read together with the Rule and section 60.2.1 of the CFA. To the extent there is any conflict between this Companion Policy, the legislation and the Rule, the legislation and the Rule prevail.

Background

The Commission works to protect investors from unfair, improper or fraudulent practices; foster fair, efficient and competitive commodity futures markets and confidence in those markets; foster capital formation; and contribute to the stability of the financial system and the reduction of systemic risk. This mandate is achieved by administering and enforcing compliance with Ontario commodity futures law.

When a person or company is alleged to have contravened Ontario commodity futures law, the Commission may bring enforcement proceedings before the Capital Markets Tribunal (the **Tribunal**) or the courts. The Tribunal and the courts can impose various monetary and non-monetary sanctions. Where the Tribunal has made a finding or the court has made a declaration that a person or company has not complied with Ontario commodity futures law, one of the orders they may make is an order that the person or company disgorge to the Commission any amounts obtained as a result of the non-compliance.ⁱ The Commission, exercising its prosecutorial discretion, selects cases, moves forward investigations, collects evidence, and calls witnesses as needed depending on the type of case being brought forward and the regulatory message being sent. Accordingly, a disgorgement order will not be applicable in all cases.

The primary purpose of a disgorgement order is not to compensate investors, but to prevent a wrong-doer from keeping amounts they obtained as a result of the misconduct. Disgorgement is distinct from restitution. Restitution is a remedy that aims to restore a person to the position they would have been in if not for the improper action of another.

The Commission makes reasonable efforts to collect monetary sanctions imposed by the Tribunal or the Superior Court of Justice, including collecting on disgorgement orders. In some situations, there may be little or no money, assets or property that can be seized for collections. However, to the extent the Commission can collect money under a disgorgement order, the CFA requires the Commission to distribute the money in accordance with the Rule to persons or companies who,

- incurred direct financial losses as a result of the contravention giving rise to the payment; and
- satisfy the conditions, restrictions and requirements set out in the Rule.ⁱⁱ

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The CFA provides that such distributions may be carried out in the following ways:

- by an administrator appointed by the Superior Court of Justice following a process established by the court, or
- directly by the Commission following a process set out in Part 5 of the Rule.ⁱⁱⁱ

The distribution process set out in the CFA is a claims-based process which relies on information submitted by applicants to prove their claims. Disgorgement is a remedy that focuses on the amount obtained by the respondent as a result of the contravention. The disgorgement remedy does not focus on “who lost what”. Accordingly, the Commission may not have information to substantiate financial losses incurred by specific harmed investors. Therefore, it is the applicant’s responsibility to provide their best information so that the Commission or administrator can make determinations about their claim.

Method of Distribution

There are two potential methods of distribution. The first involves the Commission seeking an administrator to be appointed by the court. The second is the Commission conducting a distribution directly under Part 5 of the Rule.

The method of distribution selected by the Commission will depend on the circumstances of each case. It is anticipated that most distributions will be conducted by an administrator. The Commission will generally carry out the distribution directly under Part 5 of the Rule only if the Commission is satisfied that:

- the potential applicants can be readily identified and are small in number, and
- their financial losses can be readily quantified.

The geographic location of potential applicants may also be a relevant consideration for choosing the method of distribution.

In cases where the Commission does not have sufficient information about potential applicants and their estimated losses to evaluate the appropriate method to distribute the disgorged amount, section 14 of the Rule allows the Commission to initiate the claims process under Part 5 of the Rule and later apply to the court for the appointment of an administrator to complete the distribution. It is expected that the Commission would rely on section 14 when appropriate, based on the nature or volume of the claims received. For example, the claims submitted to the Commission may indicate that there is a high volume of claims or complex issues that are better dealt with by an administrator.

Section 1 - Definitions

Unless defined in the Rule, terms used in the Rule and in this Companion Policy have the meaning given to them in securities legislation, including, for greater certainty, in OSC Rule 14-501 *Definitions*.

Definition of Eligible Applicant***Persons or companies***

Investors who are eligible for a payment from the disgorged amount received by the Commission are referred to in the Rule as “eligible applicants”. The definition of an eligible applicant includes any person or company that incurred direct financial losses as a result of a contravention that gave rise to a disgorgement order provided that the person or company did not directly or indirectly participate in the conduct that resulted in the disgorgement order.

Eligible applicants can submit claims even if they were not identified in the course of the underlying enforcement investigation or proceeding. An eligible applicant will generally be a person or company that was harmed during the relevant time period when the contravention took place. This time period is typically defined in the relevant decision or settlement agreement accompanying the disgorgement order.

Direct financial losses

The Rule deals with contraventions that were found in proceedings or identified in settlement agreements that gave rise to disgorgement orders. Only financial losses that were directly caused by these contraventions are eligible for payment.

What constitutes a “direct financial loss” may depend on the nature of the contravention. For example:

- in a case where the underlying contravention involved a fraudulent investment scheme, a direct financial loss might include any of the amount invested in the scheme and any related fees the investor paid to the respondent (other than amounts that were repaid to the investor). However, indirect financial losses incurred by investors in this scheme, such as expenses incurred by withdrawing from a different investment in order to invest in the scheme, would not be eligible for payment from the disgorged amount.

- in other cases, an investor's "direct financial loss" could be confined to a fee paid by the investor to a respondent that the investor should not have paid, or was in excess of what they should have paid, due to conduct of the respondent such as a failure to maintain proper internal controls.

Types of losses that are not eligible for payment include:

- financial losses relating to conduct that was not proven in the proceeding (for example, financial losses resulting solely from a decrease in the value of an investment that is unrelated to the respondent's contravention),
- financial losses relating to conduct occurring outside of the relevant time period considered in the proceeding,
- financial losses relating to the loss of an opportunity,
- interest on any financial loss, and
- non-financial losses.

PART 2 REQUIREMENT TO DISTRIBUTE

Subsection 2 (1) - Circumstances where a distribution is required

The Rule provides that money received by the Commission under a disgorgement order must be distributed in circumstances other than where the amount received is too small to justify the costs of distributing it.

Money received by the Commission that fits within this exception will be dealt with in accordance with subsection 19 (2) of the *Securities Commission Act, 2021* (the **SCA**), which limits the use of these funds to specific purposes.^{iv}

Subsections 2 (2) to (5) - Partial amounts received

The Commission's approach to dealing with partial amounts received under a disgorgement order will vary depending on the particular circumstances of a case. Whether to distribute, hold, or not distribute these funds will depend on details such as the following:

- the amount received,
- the status of any steps taken by the Commission to recover additional amounts owing under the order,
- whether the order or an agreement such as a payment plan provides that payments under the order may be made at a future date, and
- the time that has passed from either the date of the final disposition of the order, or if the order has been appealed, the date the appeal was resolved.

The Commission makes reasonable efforts to enforce Tribunal and court orders, including collecting unpaid monetary sanctions and costs. Tribunal orders are routinely filed in the Superior Court of Justice. Under Ontario commodity futures law, Tribunal orders then become enforceable as though they are court orders. This allows the Commission to use a range of creditor remedies to collect amounts owing, which can include garnishment, seizure and sale of property, and registering liens. It is important to note that in these circumstances the Commission becomes an ordinary creditor of the respondent. There is no guarantee that any funds, assets, or property may be realized through creditor remedies. In addition, any funds, assets or property may be shared with other creditors based on any creditor priorities.

There may be situations where the Commission has received only part of the amount payable under the disgorgement order and that amount is not sufficient to justify the costs of administering a distribution. In these cases, the Rule requires the Commission to hold the amount received for potential distribution to eligible applicants until the earlier of 3 years from the date of the final disposition of the disgorgement order and the date that the Commission receives sufficient amounts under the disgorgement order to justify the costs of a distribution. In circumstances where the disgorgement order has been appealed, this 3-year period runs from the date the appeal has been resolved.

During this 3-year period, the Commission may receive a partial amount under the disgorgement order that meets the threshold for carrying out a distribution. In these cases, the Commission may consider the following factors before deciding whether to proceed with a distribution or hold the funds for an additional period to allow for further amounts to be recovered:

- the status of any ongoing collection efforts,

- the timing and amount of any future payments that are anticipated to be received under the terms of the order or a payment plan, and
- the anticipated costs of carrying out one or more distributions.

Following this 3-year period, the Commission may not recover sufficient amounts under the order to justify the costs of administering a distribution. In this case, the Rule provides that the Commission is not required to distribute the disgorged amount. However, there may be situations where there is ongoing collections activity at the end of this 3-year period. For example, there may be a court proceeding to recover additional amounts owing under the order. In these cases, the Rule provides the Commission with discretion to continue to hold amounts received for potential future distribution to eligible applicants beyond the 3-year period. The Commission may do this if it is of the opinion that sufficient additional amounts may be recovered within a reasonable timeframe that would satisfy the threshold for carrying out a distribution.

Similarly, there may be occasions where the order or a payment plan provides that payments under the order may be made at a future date beyond the 3-year period. In these situations, the Commission may decide to continue to hold the amounts received for potential future distribution to eligible applicants. The Commission may do this if it is of the opinion that sufficient additional amounts may be recovered within a reasonable timeframe that would satisfy the threshold for carrying out a distribution.

PART 3 PUBLICATION OF DISGORGEMENT AMOUNTS AND NOTICE OF CLAIMS PROCESS

Part 3 of the Rule involves two distinct steps. The first step is the publication of disgorged amounts received by the Commission. The second step is the publication of the notice of claims process.

Section 3 - Publication of money received under disgorgement orders

For each case where disgorgement is ordered, amounts received by the Commission under that order will be published on its website and updated to include additional amounts received within 30 days after the end of each calendar quarter (March 31, June 30, September 30 and December 31). As part of these quarterly updates, additional information relevant to the distribution will be added as it becomes available. Information published on the website will generally include:

- the proceeding under which the disgorgement order was made and the respondent(s) to that proceeding who are subject to that order;
- the amount owing individually and/or jointly by the respondents under the disgorgement orders, the amount received by the Commission, and any amounts outstanding in respect of these orders; and
- any other information the Commission considers appropriate.

Section 4 - Publication of notice of claims process

The Rule requires that a notice relating to how a distribution will be carried out will be published on the Commission's website, including information about how eligible applicants can make a claim and the deadline by which claims must be filed to be considered. In addition, the Commission may look to amplify the website posting through additional channels such as through press releases, social media channels, and investor advocacy organizations.

If the distribution is being carried out directly by the Commission under Part 5 of the Rule, the Commission will also attempt to send the notice to the last known address (including an electronic address), if available, of any known potential eligible applicants.

If the distribution is being carried out by an administrator, any additional notice requirements will be specified in the claims process order established by the court.

PART 4 REQUIREMENT TO UPDATE CLAIMS APPLICATION

Sections 5 and 6 - Requirement to update claims application

It is the applicant's responsibility to ensure that the Commission or the administrator has correct and up-to-date information about the claim.

Under a distribution carried out by the Commission under Part 5 of the Rule, a claim may be denied if any of the following apply:

- the person or company fails to promptly report any changes to the information provided in their application if the information changes in a material respect so that the information provided is now untrue or misleading or omits information that would make the information originally provided not untrue or misleading;

- the person or company makes a statement or provides information to the Commission in their application that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement or information not misleading.

PART 5 CLAIMS PROCESS IF NO COURT-APPOINTED ADMINISTRATOR

Section 7 - Application

Part 5 of the Rule applies if there is no administrator.

Section 8 - Contents of the notice of claims process

If the Commission elects to directly distribute money it has received under a disgorgement order using the process set out in Part 5 of the Rule, the Commission will publish a notice on its website explaining how eligible applicants can make a claim. This notice will include important information such as the name of the proceeding under which the disgorgement order was made, the amount that is being distributed, and the deadline for eligible applicants to file claims.

Applicants will generally have the option to either file claims electronically or using a paper form provided by the Commission. Applicants will have at least 90 days from the date of the notice to make a claim. Any claim filed after the final day for filing a claim specified in the notice will not be considered.

While this minimum 90-day period may allow simpler distributions to be completed relatively quickly, the Commission may set a period longer than 90 days depending on the circumstances of the case. For example, the Commission may establish a longer claims period if the Commission has limited information about potential applicants or if potential applicants are located outside of Canada.

If at the time the notice is posted, the amount received under the disgorgement order does not represent the full amount payable under the order, any additional amounts received under the order prior to the conclusion of the distribution will be included in the distribution.

Section 9 - Claim requirements

The claim form will be available on the Commission's website. Although the claim form may differ somewhat depending on the case, at a minimum, applicants can expect to provide the following information and documentary evidence to support their claim:

- applicant's name, address and contact information;
- information about the claim, including:
 - the applicant's direct financial losses and the amount claimed;
 - how the applicant believes the contraventions that gave rise to the disgorgement order directly resulted in the financial losses claimed by the applicant;
 - any amounts received from the relevant investment (e.g., dividends, interest income, capital gains, return of capital, etc.);
 - any other sources (e.g., other litigation action) from which payment for the loss claimed has been paid, is payable or may be payable to the applicant, and the amount of that payment;
 - the applicant's involvement in the misconduct, if any;
 - whether the Commission has ever denied the applicant's claim for this or any other loss;
- documentary evidence to support the claim such as account statements, records of wire or e-transfers, investment agreements, etc.;
- applicant's certification that the information in the form and where applicable, material submitted in support of the claim, is true and correct;
- updates to the information that has been provided to the Commission if there have been any changes;
- applicant's certification that they understand that after the final day for filing a claim, the Commission may apply to the Superior Court of Justice to have an administrator appointed to distribute the disgorged amount. In this

case, any claims received by the Commission on or before the final day for filing will be provided to the administrator to be administered under an order made by the court.

As noted above, it is the applicant's responsibility to provide their best information so that the Commission can make determinations about the claim. However, there may be cases where, prior to commencing a claims process, the Commission has sufficient information to assess the financial losses sustained by particular investors who were harmed by the conduct giving rise to the disgorgement order. In these cases, the claim form may invite applicants to do one of the following:

- confirm the accuracy and completeness of the claim amount assessed by the Commission, in which case no further documentary evidence will need to be submitted,
- decline to make a claim, or
- make a claim for a different amount, supported by documentation evidencing the amount claimed.

Section 10 - Determining eligibility and amount of payment

Subsections 10 (1) to (3) - Claim Determinations

After reviewing all claims filed under Part 5 of the Rule, the Commission will make claim determinations under section 10 of the Rule. The Commission will make these determinations after considering recommendations from Commission staff who will review all claims.

The Commission may make a payment to the applicant if the Commission is satisfied that all of the following apply:

- the applicant is an eligible applicant in respect of the disgorgement order;
- the amount of the applicant's direct financial loss can be quantified;
- sufficient proof of the direct financial loss has been provided.

When determining the amount to be paid to the eligible applicant, the Commission must consider all of the following:

- the amount of money received under the disgorgement order;
- the direct financial loss suffered by the eligible applicant;
- the direct financial losses suffered by all eligible applicants;
- any other information the Commission considers appropriate in the circumstances.

When determining an applicant's direct financial loss for the purposes of section 10, the Commission must not include any amount claimed by the applicant in respect of a loss of opportunity or interest on any loss, and must consider all of the following:

- whether the applicant received or is entitled to receive a payment from other sources for the direct financial loss resulting from the contravention that gave rise to the disgorgement order;
- whether the applicant benefitted from the contravention that gave rise the disgorgement order.

The Commission's practice will be to communicate the outcomes of its determinations to applicants in writing.

Subsection 10 (4) - Prorated payments

The Commission's practice will be to use the following formula to prorate payments under subsection 10 (4) of the Rule:

$$\frac{A \times B}{C}$$

where

A = the amount of money received by the Commission under the order less any administrative costs that have been deducted from the disgorged amount,

B = the financial loss suffered by the eligible applicant, and

C = the financial loss suffered by all eligible applicants.

Subsection 10 (5) - Exception

The Commission may decline to make a payment to an eligible applicant if, in the opinion of the Commission, the amount of the payment would be too small to justify the costs of making the payment. While the Commission has not established any specific monetary cut-off for declining payments, which may depend on the circumstances of the case, it is anticipated that payments of less than \$50 will generally not be issued. In circumstances where the Commission declines to issue a payment to an eligible applicant under this subsection of the Rule, the amount that would have otherwise been payable to the applicant will be added back to the amount available for distribution to the remaining eligible applicants.

Section 11 - Opportunity to provide additional supporting documentation

Before the Commission denies all or part of a claim, the Commission will provide applicants with the opportunity to provide additional supporting documentation to substantiate their eligibility and any disputed amount. The Commission will provide the notice in writing and the applicant will have 30 days from the date the notice was delivered to file the additional supporting documentation.

Section 12 – No payment until all claims are determined

Subsection 12 (1) of the Proposed Rule provides that no payments shall be made until all claims filed under the Rule have been considered and the amount to be paid to each applicant has been determined. However, if there are any disputed claims, subsection 12 (2) allows the Commission to make partial installment payments to the remaining eligible applicants. In these cases, the Commission will hold back a portion of the disgorged amount in respect of the disputed claim.

Section 13 - Residual funds

In practice, in circumstances where payments are made by cheque, the Commission will undertake reasonable efforts to contact the eligible applicants who have not deposited their cheques after 90 days following the issuance of the cheque. The purpose of the Commission’s efforts to contact these eligible applicants is to ensure that they have a reasonable opportunity to participate in the distribution. Approved claim amounts that the Commission is unable to distribute to eligible applicants after 180 days following the date payments are issued will be dealt with in accordance with subsection 19 (2) of the SCA^v.

Section 14 - Election to seek appointment of administrator following final day for filing a claim

There may be cases where the Commission does not have sufficient information about potential applicants and their estimated losses to evaluate the appropriate method to distribute the disgorged amount. In these cases, the Commission may initiate the claims process under Part 5 of the Rule and later apply to the court for the appointment of an administrator to complete the distribution. The approach taken will depend on the nature or volume of the claims received by the Commission, and may take into account factors such as:

- the number of claims received,
- the volume and complexity of the documentation that must be reviewed to evaluate the claims,
- the location of the applicants,
- any special requirements of applicants (for example, language requirements), and
- the resources and expertise required to conduct the distribution.

If the Commission seeks to have an administrator appointed to complete a distribution that was initiated under Part 5 of the Rule, the distribution will be governed by the court’s claims process order instead of the Rule. In these circumstances, the Commission will give the administrator any information that was received from applicants following the initiation of the claims process.

**PART 6
ADMINISTRATIVE COSTS**

Section 15 - Payment of administrative costs

The CFA contemplates that certain administrative costs relating to distributions are eligible to be paid from the disgorged amount that is being distributed or, in accordance with the regulations, from other sanction and settlement money held by the Commission that it has allocated for this purpose. These costs include the reasonable costs incurred by an administrator in carrying out a distribution,^{vi} or in the case of a distribution carried out directly by the Commission under the Rule, reasonable costs incurred by the Commission in obtaining external advice relating to the distribution^{vii}.

The sanction and settlement money that may be allocated by the Commission to pay these administrative costs includes administrative penalties, settlement payments, and amounts disgorged to the Commission that are not subject to the distribution requirement. These funds are held in a separate account by the Commission. The Commission’s practice is to set aside funds

held in this account for various purposes authorized under subsection 19 (2) of the SCA on an annual basis. In keeping with this practice, the Commission may set aside some of these funds for potential use toward the payment of eligible administrative costs relating to distributions.

The Rule provides that for each distribution, administrative costs will be paid:

- (1) First, from any administrative penalty or settlement money received by the Commission in relation to the same proceeding as the disgorged amount that is the subject of the distribution.
- (2) Next, from other unrelated sanction and settlement money the Commission has set aside for potential payment of such costs, as described above, and in such an amount the Commission considers appropriate after considering factors including:
 - the balance of funds set aside by the Commission for the purpose of paying administrative costs that is available for such payments,
 - the amount of any administrative costs that have already been paid from administrative penalty or settlement money received by the Commission in relation the same proceeding as the disgorged amount that is the subject of the distribution,
 - the value of the disgorged amount that is the subject of the distribution, and
 - the estimated financial losses incurred by potential applicants as a result of the relevant contravention or the value of the approved claim amount if that amount has been determined by the Commission or the administrator.
- (3) Finally, if any administrative costs remain, from the disgorged amount that is being distributed.

PART 7 REPORTING

Section 16 - Reporting

The Rule provides that the Commission will publish a report no later than 60 days following the conclusion of the distribution. This report will describe the results of the distribution. It will include data such as the percentage of each eligible applicant's approved claim amount paid under the distribution. The Commission's practice will be to anonymize any such data.

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- i The Tribunal's authority to make an order requiring a person or company to disgorge to the Commission any amounts obtained as a result of non-compliance with Ontario commodity futures law is found in paragraph 10 of subsection 60 (1) of the CFA. The authority of the Ontario Superior Court of Justice to make an order requiring a person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance with Ontario commodity futures law is found in paragraph 11 of subsection 60.2 (3) of the CFA.

In some cases, the Commission may lay quasi-criminal charges and prosecute alleged wrongdoers through the Ontario Court of Justice under section 55 of the CFA, which may result in a fine or imprisonment on conviction. Any such fine is not subject to the distribution framework under the Rule.
 - ii The legislative framework for distributing money disgorged to the Commission is found in section 60.2.1 of the CFA.
 - iii Subsections 60.2.1 (4) and (10) of the CFA set out the two methods of distribution.
 - iv Subsection 60.2.1 (15) of the CFA provides that if the regulations do not require a distribution, the disgorged amount belongs to the Commission and shall be dealt with in accordance with subsection 19 (2) of the SCA.

Subsection 19 (2) of the SCA allows the Commission to allocate this money for the following purposes:

 - (i) to or for the benefit of third parties,
 - (ii) for use by the Commission or third parties for the purpose of educating investors or promoting or otherwise enhancing knowledge and information of persons regarding the operation of the securities and financial markets,
 - (iii) for use to pay administrative costs in relation to the distribution of disgorged amounts in accordance with subsection 60.2.1 (9) or (12) of the CFA, or
 - (iv) for any other purpose specified in the regulations. Purposes specified in O. Reg. 28/24 include certain technology and data enhancement expenditures of the Commission and funding activities of the Commission's Office of Economic Growth and Innovation.
 - v Subsection 60.2.1 (14) of the CFA provides that any disgorged amount remaining after payments are made to the applicants and towards administrative costs of the distribution belongs to the Commission and shall be dealt with in accordance with subsection 19 (2) of the SCA. See Endnote iv for information on limits to the use of funds under subsection 19 (2) of the SCA.
 - vi Subsection 60.2.1 (9) of the CFA describes the administrative costs that are eligible for payment from other sanction and settlement money held by the Commission and described in subclause 19 (2) (b) (iii) or clause 19 (2) (c) of the SCA where the distribution is carried out by an administrator.
 - vii Subsection 60.2.1 (12) of the CFA describes the administrative costs that are eligible for payment from other sanction and settlement money held by the Commission and described in subclause 19 (2) (b) (iii) or clause 19 (2) (c) of the SCA where the distribution is carried out by the Commission following the process established under the Rule.

ANNEX E

REGULATORY IMPACT ANALYSIS

Introduction

The Commission is publishing this annex to supplement the OSC Notice and Request for Comment (the **Notice**) setting out the Commission's regulatory impact analysis of the Proposed Rule.

Unless otherwise defined in this Annex, defined terms or expressions used in this Annex share the meanings provided in the accompanying Notice.

As described in the Notice, prior to the passage of the legislative amendments contained in Bill 146, there was no statutory requirement or prescribed process for distributing sanction and settlement funds¹ to harmed investors. The legislative amendments create a statutory framework governing the distribution of money received by the Commission under disgorgement orders to harmed investors and provide that regulations (which may take the form of an OSC rule or a regulation made by the Lieutenant Governor in Council) will address:

- the circumstances in which money received by the Commission under disgorgement orders is required to be distributed;
- the eligibility requirements for investors seeking a payment from the disgorged amounts received by the Commission;
- a process for distributing disgorged amounts to harmed investors in cases where a court-appointed administrator is not used; and
- the use of other monetary sanctions and settlement payments received by the Commission to pay certain administrative costs in relation to the distribution of disgorged amounts.

The Proposed Rule and the Proposed Companion Policy are being published for comment to address these matters.

Current Practice Relating to Monetary Sanctions Received by the Commission

There is currently no statutory requirement or prescribed process to distribute monetary sanctions received by the Commission to harmed investors. However, the Commission is currently authorized under subsection 19 (2) of the SCA to allocate sanction and settlement money it receives, including money received under disgorgement orders, "to or for the benefit of third parties", which can include harmed investors. The Commission's current practice is to allocate such funds to investors who were directly harmed by the conduct giving rise to the payment if it is practicable in the circumstances to carry out a distribution. This assessment is made before any other possible uses for funds received in a given case are considered and includes a consideration of whether there is an appropriate mechanism to carry out the distribution.

In most cases, a claims-based process is necessary to identify the harmed investors and quantify and verify their losses. Currently, the only avenue for the administration of a claims-based process under the OSA and CFA is a receivership. Section 129 of the OSA or section 60.3 of the CFA allow the OSC to apply to the Superior Court of Justice for an order appointing a receiver over the property of any person or company if it is appropriate for the due administration of Ontario securities law or Ontario commodity futures law. The OSC has relied on section 129 of the OSA to have a receiver appointed by the court to manage a claims process to distribute monetary sanctions to harmed investors. However, this approach is generally only suitable in circumstances where the amount available for distribution is sufficient to bear the costs of a receivership.

There is currently no alternative process under the OSA and CFA for carrying out distributions that are smaller in value or less complex. In these situations, the OSC has generally sought the assistance of the Ministry of Attorney General (**MAG**) to carry out the distribution using the civil forfeiture and claims adjudication process under the *Civil Remedies Act, 2001* which requires the MAG to first obtain a forfeiture order from the court over the funds held by the Commission.² There may be additional steps associated with this claims process, including, for example, seeking orders from the Tribunal to permit sharing of investor related information obtained during the underlying enforcement matter.

In limited circumstances, where there were a very small number of identifiable investors with readily quantifiable losses, the Commission has directly distributed funds to these harmed investors.

¹ Sanction and settlement funds refer to moneys (disgorgement, administrative penalty and/or settlement payments) received by the Commission pursuant to an order issued by the Tribunal or under the terms of a settlement agreement approved by order of the Tribunal.

² S.O. 2001, c. 28.

New Statutory Framework

Going forward, the legislative amendments and the Proposed Rule will replace the current practice with a new statutory framework that will establish a process to distribute money received by the Commission under disgorgement orders to harmed investors. The legislative amendments provide that distributions may be carried out either by a court-appointed administrator or directly by the OSC. Distributions carried out by a court-appointed administrator will be carried out in accordance with the terms of an appointment and claims process order established by order of the court, which can be tailored to the circumstances of the case. Distributions carried out directly by the OSC will follow a claims process set out in the Proposed Rule, which can be used for smaller scale, more straightforward distributions. This approach provides the Commission with flexibility to determine on a case-by-case basis how best to carry out a distribution, having regard for the particular circumstances of the case and to adapt to the volume and complexity of distributions that may be required at any given time. The number and complexity of distributions that may be conducted at any given time is anticipated to vary depending on the nature of the enforcement proceedings that are concluded, whether disgorgement has been ordered, and the Commission's ability to collect amounts that have been ordered to be disgorged.

Historically, over the 10-year period between April 1, 2014 to March 31, 2024, disgorgement has been ordered in 75 cases and collected in 45 cases. An analysis of the cases where money has been collected (excluding cases relating to insider trading and where small amounts have been collected) shows that, the Commission may be required to conduct up to 7 distribution processes per year, with the average over the 10-year period being approximately 2 per year.

Affected Stakeholders

Given that the distribution of disgorged funds will take place after the conclusion of the enforcement proceeding against the respondents, the primary stakeholders affected by the Proposed Rule are investors and the Commission.

Through the implementation of the Proposed Rule, there will be a procedural and administrative process for the Commission to follow when carrying out distributions to harmed investors. As such, investors harmed by the conduct that resulted in the disgorgement order and who meet the eligibility requirements set out in the Proposed Rule will be able to apply for a payment from the disgorged funds being distributed. The Commission is impacted to the extent of developing, implementing and administering operational processes and procedures to be able to effectively operationalize the statutory framework. This includes overseeing the distributions conducted under the new framework and in certain cases, administering distributions directly.

Anticipated Benefits

Implementation of the Proposed Rule will lead to improved investor redress and outcomes and increase investor confidence in the capital markets.

The Proposed Rule will codify a process for, and streamline the OSC's ability to, distribute money received by the Commission under disgorgement orders to harmed investors in a transparent and efficient manner. Investors will be able to check the Commission's website to learn if, when and how much has been received by the Commission under a particular disgorgement order and whether or how a distribution will take place. This increased transparency is anticipated to lead to higher levels of participation in the claims process, which may occur several years after the order was issued (depending on whether collection actions were required to enforce the disgorgement order).

Historically, collection rates from regulated market participants have been much higher than from respondents sanctioned on matters related to fraud – where assets are typically non-existent or inaccessible. Importantly, the legislative amendments and the Proposed Rule may strengthen the OSC's ability to collect on its disgorgement orders in foreign jurisdictions where a respondent's assets may reside, as the presence of a notice and claims process governing disgorged amounts may be a factor that foreign courts consider to be relevant in supporting the enforceability of disgorgement orders.³

The implementation of the Proposed Rule will increase investor confidence in Ontario's capital markets and align the OSC with other Canadian and international securities regulators that have similar statutory frameworks. This will also address the recommendation of the Auditor General of Ontario that the OSC establish a timely and efficient process to support the distribution of disgorged funds to harmed investors, after reviewing the process in other jurisdictions.

Anticipated Costs

If implemented, the Proposed Rule will require the Commission to develop and implement processes and procedures to operationalize the framework to distribute disgorged funds to harmed investors. While it is anticipated that most distributions will be carried out by a court-appointed administrator, in some cases, the Commission may conduct distributions directly under the Proposed Rule.

If the Commission elects to apply to the court for the appointment of an administrator, the process will be similar to the process that is currently followed in appointing a receiver. In the Commission's experience, costs generally tend to vary depending on the

³ See for example *Lathigee v. B.C. Secs. Comm'n*, 477 P.3d 352 (Nev. December 10, 2020).

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size of the distribution, the volume and complexity of the claims, the location of the applicants, any special requirements of the applicants (for example, language requirements), and the resources and expertise required to conduct the distribution. In the three distributions of monetary sanction and settlement money distributed by the Commission conducted using a receiver, costs ranged from \$60,000 to \$320,000. The Proposed Rule contemplates that administrative costs will be paid through related and other sanctions and settlement money held by the Commission or if administrative costs remain, from the amount available for distribution. Accordingly, third party costs associated with carrying out distributions using a court-appointed administrator under the new framework will not impact the Commission's operational costs.

To support direct distributions by the Commission under the Proposed Rule, the Commission will be required to:

- develop and implement operational processes and procedures and update existing procedures;
- design, develop and implement in-house technology tools and systems, if needed, and update existing systems;
- build limited internal staff resources to administer direct distributions, including but not limited to preparing claims packages, reviewing claims, responding to investor questions, making and tracking payments, record keeping and reporting.

All of the above activities will impose one-time implementation costs and incremental ongoing costs on the Commission.

As part of the technology implementation, the Commission intends to develop and implement an online system to receive claims and as such, does not anticipate any material incremental costs to investors as a result of the Proposed Rule. If investors choose to mail their applications instead of using the Commission's online system, investors may incur mailing costs which may vary depending on the geographic location of the investors.

The Commission does not anticipate any corresponding material costs (initial or ongoing) associated with implementing the Proposed Rule on market participants.

On balance, we consider that the benefits associated with strengthening the investor protection framework in Ontario and increasing investor confidence in the capital markets by implementing this new statutory framework are proportionate to the costs, which will be primarily incurred by the Commission.

ANNEX F

**EXCERPTS FROM BILL 146 WITH RESPECT TO AMENDMENTS TO THE
COMMODITY FUTURES ACT, THE SECURITIES ACT AND THE SECURITIES COMMISSION ACT, 2021**

EXPLANATORY NOTE

**SCHEDULE 1
COMMODITY FUTURES ACT**

Section 60.2 of the Act is amended to provide that certain disgorged amounts under court orders shall be paid to the Commission. New section 60.2.1 of the Act sets out the rules governing the distribution of money received under disgorgement orders made under the Act. The Commission is given the authority to make rules governing disgorged amounts.

**SCHEDULE 10
SECURITIES ACT**

Section 128 of the Act is amended to provide that certain disgorged amounts under court orders shall be paid to the Commission. New section 128.1 of the Act sets out the rules governing the distribution of money received under disgorgement orders made under the Act. The Commission is given the authority to make rules governing disgorged amounts.

**SCHEDULE 11
SECURITIES COMMISSION ACT, 2021**

Section 19 of the *Securities Commission Act, 2021*, which sets out rules governing the Commission's income, is amended to provide that certain money received by the Commission in respect of disgorgement orders is not required to be paid into the Consolidated Revenue Fund.

**SCHEDULE 1
COMMODITY FUTURES ACT**

6 Paragraph 11 of subsection 60.2 (3) of the Act is repealed and the following substituted:

11. An order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance with Ontario commodity futures law.

7 The Act is amended by adding the following section:

Disgorgement orders

60.2.1 (1) This section applies with respect to orders made under paragraph 10 of subsection 60 (1) and paragraph 11 of subsection 60.2 (3).

Distribution of disgorged amount

(2) In the circumstances prescribed by the regulations, all or part of the disgorged amount received by the Commission shall be distributed in accordance with this section and the regulations to persons or companies who,

- (a) incurred direct financial losses as a result of the contravention giving rise to the payment; and
- (b) satisfy such conditions, restrictions and requirements as may be prescribed.

Application for payment

(3) If the regulations require a distribution, persons or companies described in subsection (2) may apply for a payment from the disgorged amount and shall do so in accordance with any applicable court order or regulation.

Court appointment of administrator

(4) On application by the Commission, the Superior Court of Justice may make an order appointing one or more persons or companies to administer and distribute all or any part of the disgorged amount if the court is satisfied that the appointment is appropriate for the due administration of Ontario commodity futures law.

Commission as court-appointed administrator

(5) The Commission may be appointed under subsection (4).

Powers and duties, etc.

(6) The court order shall specify the administrator's powers and duties and the process for distributing any disgorged amount and may include such terms as the court considers just and expedient in the circumstances.

Variation or revocation of order

(7) The court order may be varied or revoked by the court on application by the Commission or by the court-appointed administrator.

Payment to applicant

(8) The court-appointed administrator may, in accordance with the court order, make a payment to an applicant from the disgorged amount administered under the court order.

Administrative costs, court-appointed administrator

(9) The following administrative costs are eligible to be paid to a court-appointed administrator from the disgorged amount or, in accordance with the regulations, from money described in subclause 19 (2) (b) (iii) or clause 19 (2) (c) of the *Securities Commission Act, 2021*:

- 1. The reasonable costs incurred by the administrator, before their appointment, in connection with the disgorged amount.
- 2. The reasonable costs incurred by the administrator in connection with court orders made under this section.

If no court-appointed administrator

(10) If the regulations require a distribution and there is no court-appointed administrator for all or a part of a disgorged amount, the Commission shall administer and distribute the disgorged amount or the part, as the case may be, in accordance with the regulations.

Same, payment to applicant

(11) The Commission may, in accordance with the regulations, make a payment to an applicant from the disgorged amount administered by the Commission under subsection (10).

Administrative costs, no court-appointed administrator

(12) In the circumstances described in subsection (10), the following administrative costs are eligible to be paid to the Commission from a disgorged amount or, in accordance with the regulations, from money described in subclause 19 (2) (b) (iii) or clause 19 (2) (c) of the *Securities Commission Act, 2021*:

1. The reasonable costs of obtaining external advice related to a distribution of the disgorged amount.

Operating costs not recoverable

(13) The Commission's normal operating costs are not eligible to be paid as administrative costs under subsection (9) or (12).

Disgorged amount — distribution

(14) Any disgorged amount remaining after payments are made under subsections (8), (9), (11) and (12) belongs to the Commission and shall be dealt with in accordance with subsection 19 (2) of the *Securities Commission Act, 2021*.

Disgorged amount — no distribution

(15) If the regulations do not require a distribution, the disgorged amount belongs to the Commission and shall be dealt with in accordance with subsection 19 (2) of the *Securities Commission Act, 2021*.

Limitation re participation in proceeding

(16) A person or company is not entitled to participate in a proceeding in which an order may be made under this section solely on the basis that the person or company may be eligible to receive a payment under subsection (8) or (11).

10 (1) Subsection 65 (1) of the Act is amended by adding the following paragraphs:

40. Respecting the administration and distribution of disgorged amounts under section 60.2.1.

41. Respecting the use of money described in subclause 19 (2) (b) (iii) or clause 19 (2) (c) of the *Securities Commission Act, 2021* to pay administrative costs in relation to the distribution of disgorged amounts under section 60.2.1 of this Act.

(2) Clause 65 (2) (a.1) of the Act is repealed.

**SCHEDULE 10
SECURITIES ACT**

8 Paragraph 15 of subsection 128 (3) of the Act is repealed and the following substituted:

15. An order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance with Ontario securities law.

9 The Act is amended by adding the following section:

Disgorgement orders

128.1 (1) This section applies with respect to orders made under paragraph 10 of subsection 127 (1) and paragraph 15 of subsection 128 (3).

Distribution of disgorged amount

(2) In the circumstances prescribed by the regulations, all or part of the disgorged amount received by the Commission shall be distributed in accordance with this section and the regulations to persons or companies who,

- (a) incurred direct financial losses as a result of the contravention giving rise to the payment; and
- (b) satisfy such conditions, restrictions and requirements as may be prescribed.

Application for payment

(3) If the regulations require a distribution, persons or companies described in subsection (2) may apply for a payment from the disgorged amount and shall do so in accordance with any applicable court order or regulation.

Court appointment of administrator

(4) On application by the Commission, the Superior Court of Justice may make an order appointing one or more persons or companies to administer and distribute all or any part of the disgorged amount if the court is satisfied that the appointment is appropriate for the due administration of Ontario securities law.

Commission as court-appointed administrator

(5) The Commission may be appointed under subsection (4).

Powers and duties, etc.

(6) The court order shall specify the administrator's powers and duties and the process for distributing any disgorged amount and may include such terms as the court considers just and expedient in the circumstances.

Variation or revocation of order

(7) The court order may be varied or revoked by the court on application by the Commission or by the court-appointed administrator.

Payment to applicant

(8) The court-appointed administrator may, in accordance with the court order, make a payment to an applicant from the disgorged amount administered under the court order.

Administrative costs, court-appointed administrator

(9) The following administrative costs are eligible to be paid to a court-appointed administrator from the disgorged amount or, in accordance with the regulations, from money described in subclause 19 (2) (b) (iii) or clause 19 (2) (c) of the *Securities Commission Act, 2021*:

- 1. The reasonable costs incurred by the administrator, before their appointment, in connection with the disgorged amount.
- 2. The reasonable costs incurred by the administrator in connection with court orders made under this section.

If no court-appointed administrator

(10) If the regulations require a distribution and there is no court-appointed administrator for all or a part of a disgorged amount, the Commission shall administer and distribute the disgorged amount or the part, as the case may be, in accordance with the regulations.

Same, payment to applicant

(11) The Commission may, in accordance with the regulations, make a payment to an applicant from the disgorged amount administered by the Commission under subsection (10).

Administrative costs, no court-appointed administrator

(12) In the circumstances described in subsection (10), the following administrative costs are eligible to be paid to the Commission from a disgorged amount or, in accordance with the regulations, from money described in subclause 19 (2) (b) (iii) or clause 19 (2) (c) of the *Securities Commission Act, 2021*:

1. The reasonable costs of obtaining external advice related to a distribution of the disgorged amount.

Operating costs not recoverable

(13) The Commission's normal operating costs are not eligible to be paid as administrative costs under subsection (9) or (12).

Disgorged amount — distribution

(14) Any disgorged amount remaining after payments are made under subsections (8), (9), (11) and (12) belongs to the Commission and shall be dealt with in accordance with subsection 19 (2) of the *Securities Commission Act, 2021*.

Disgorged amount — no distribution

(15) If the regulations do not require a distribution, the disgorged amount belongs to the Commission and shall be dealt with in accordance with subsection 19 (2) of the *Securities Commission Act, 2021*.

Limitation re participation in proceeding

(16) A person or company is not entitled to participate in a proceeding in which an order may be made under this section solely on the basis that the person or company may be eligible to receive a payment under subsection (8) or (11).

11(2) Subsection 143 (1) of the Act is amended by adding the following paragraphs:

54.2 Respecting the administration and distribution of disgorged amounts under section 128.1.

54.3 Respecting the use of money described in subclause 19 (2) (b) (iii) or clause 19 (2) (c) of the *Securities Commission Act, 2021* to pay administrative costs in relation to the distribution of disgorged amounts under section 128.1 of this Act.

11(5) Clause 143 (2) (a.1) of the Act is repealed.

SCHEDULE 11
SECURITIES COMMISSION ACT, 2021

1 Subsection 19 (2) of the *Securities Commission Act, 2021* is repealed and the following substituted:

Exceptions

(2) The Commission shall pay into the Consolidated Revenue Fund money received by the Commission pursuant to an order under paragraph 9 of subsection 127 (1) of the *Securities Act* or paragraph 9 of subsection 60 (1) of the *Commodity Futures Act*, money received as payment to settle enforcement proceedings commenced by the Commission, and money described in subsections 128.1 (14) and (15) of the *Securities Act* or subsections 60.2.1 (14) and (15) of the *Commodity Futures Act*, other than,

- (a) money to reimburse the Commission for costs incurred to enforce an order of the Tribunal or for costs to be incurred for that purpose;
- (b) money that the Commission allocates,
 - (i) to or for the benefit of third parties,
 - (ii) for use, by the Commission or third parties, for the purpose of educating investors or promoting or otherwise enhancing knowledge and information of persons regarding the operation of the securities and financial markets,
 - (iii) for use to pay administrative costs in relation to the distribution of disgorged amounts in accordance with subsection 128.1 (9) or (12) of the *Securities Act* or subsection 60.2.1 (9) or (12) of the *Commodity Futures Act*, or
 - (iv) for any other purpose specified in the regulations;
- (c) previously designated money that the Commission allocates for a purpose described in clause (a) or (b); or
- (d) previously designated money that the Commission allocates for any additional purpose specified in the regulations.