

INVESTOR ADVISORY PANEL

October 9, 2024

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

Re: Proposed Rules and Companion Policies 11-502/11-503 – Distribution of Disgorged Amounts to Harmed Investors

On behalf of the Investor Advisory Panel (the “Panel”), I wish to thank you for this opportunity to comment on the Ontario Securities Commission’s (“OSC”) proposed Rules and Companion Policies 11-502 and 11-503 (collectively, the “Proposed Rules”).

The Panel’s Mandate

The Panel is an initiative of the OSC to ensure investor concerns and voices are represented in the OSC’s policy development and rulemaking process. Our mandate is to solicit and articulate the views of investors on regulatory initiatives that have investor protection implications.

General Comments

Overview

We commend the OSC for developing the framework set out in the Proposed Rules, in accordance with the recommendations of the Capital Markets Modernization Taskforce (the “Taskforce”)¹ and the Auditor General of Ontario.² As stated in the final report of the Taskforce, this process is “critical for investor protection in Ontario.”³ The distribution of funds to investors received at the conclusion of enforcement proceedings has historically been fraught with challenges, not the least of which being the complexities and costs of doing so. The Proposed Rules represent a significant step forward in the OSC’s ability to make disgorged funds available for distribution to harmed investors.

Effective Distribution Requires Effective Collections

While the Proposed Rules provide a more efficient and flexible approach to the distribution of amounts paid under disgorgement orders, this framework will only be effective if funds are collected and available for distribution. Accordingly – and recognizing that the Proposed Rules are limited to distribution – we

¹ Capital Markets Modernization Taskforce – Final Report (2021) (“Taskforce Report”).

² Office of the Auditor General of Ontario, Value for Money Audit: Ontario Securities Commission (2021) (“VFM Audit”), Recommendations 12 and 13.

³ Taskforce Report at 107.

suggest that the OSC recommend to the Ontario Ministry of Finance further legislative amendments to improve the OSC's collections powers. Both the Taskforce⁴ and Auditor General⁵ made recommendations targeted at improving the OSC's ability to successfully collect funds owed by respondents and enhancing enforcement, including for the OSC to be provided with:

- enhanced freeze powers,
- the power to seize assets transferred below market value,
- the power to seek joint and several liability for third parties and family members who receive a benefit from below-market-value transfers from a respondent,
- the power to dispose of frozen assets to retain their value,
- the ability to impose higher sanctions,
- the power to restrict access to driver's licenses and license plates for those who fail to pay amounts ordered by the OSC or the courts,
- the ability to register a lien for any amount owing under a disgorgement order, to give the OSC priority over unsecured claims, and
- the ability to impose administrative penalties for less egregious conduct,

but we are not aware of any steps currently underway to address this issue.⁶

We are also concerned that the recent Supreme Court of Canada decision in *Poonian v. British Columbia (Securities Commission)*⁷ will thwart the OSC's collections activities, and suggest that the OSC make recommendations to the Federal Department of Finance for legislative amendments to address this concern.

Specific Comments

Notifying Harmed Investors

The Proposed Rules provide that any investor who incurred a direct financial loss as a result of the contravention, and did not participate in the infringing conduct, is eligible to submit a claim for distribution. This includes investors who may not have been identified during the investigation or proceeding that led to the disgorgement order. While this allows all investors who suffered a loss to participate in the claims process, there is a risk that not all such investors will become aware of the process in time to submit a claim. It should be easy for investors to become aware of cases where they may have a claim, and it should be easy for them to participate in the claims process.

⁴ Taskforce Report at 88-90, 96-97.

⁵ VFM Audit, Recommendations 8, 11.

⁶ Follow-Up on 2021 Value-for-Money Audit: Ontario Securities Commission at 13.

⁷ 2024 SCC 28.

The only notice requirement in the Proposed Rules is that notice of a) collection, and b) the distribution process, shall be published on the OSC's website. While the OSC will attempt to notify known eligible applicants directly if it is responsible for distribution, and it has the discretion to make additional efforts to notify investors in any case, the IAP believes that notification should be made in as many forms as possible, including the dissemination of a news release and the use of social media. This is particularly important given that distributions occur long after the conclusion of the case, and information about harmed investors may be incomplete or inaccurate. For example, in the time between the commencement of a case and distribution of funds received pursuant to a disgorgement order, investors may have moved, passed away, or changed their name. In order for the distribution process to be successful, it is vital that outreach be made in as many forms as possible given the difficulty in identifying and reaching investors.

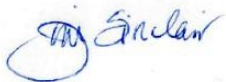
We would also recommend a coordinated approach whereby the notices of collection and distribution of all Canadian securities regulators would be aggregated and published on a centralized website.

While the OSC maintains a list of respondents with unpaid administrative penalties, disgorgement orders, and costs,⁸ we believe that the list of respondents who have failed to pay disgorgement orders should be available together with the information about collections and distributions that the OSC will be required to publish under the Proposed Rules. It would also be helpful to publish information about cases where collections efforts were unsuccessful due to a respondent's bankruptcy, move offshore, transfer of funds offshore, or other reasons. This information would help illustrate the challenges of collecting and distributing funds (particularly in cases of fraud), help manage the expectations of investors and others, and, at a minimum, allow for the public identification of egregious actors.

Finally, the IAP suggests that, in order to further assist harmed investors, the OSC could sponsor a securities class action website that would act as a clearinghouse for securities class actions that might affect Canadian investors, similar to the Securities Class Action Clearinghouse maintained by Stanford Law School.

Again, thank you for the opportunity to comment on the Proposed Rules. We would be pleased to clarify or elaborate on our comments should the need arise.

Sincerely,



James Sinclair
Acting Chair, Investor Advisory Panel

⁸ <https://www.osc.ca/en/enforcement/osc-sanctions/individuals-or-companies-unpaid-osc-sanctions>.