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SENT BY E-MAIL

Ontario Securities Commission
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario M5H 3S8

Attention: John Stevenson, Secretary

Dear Sirs/Mesdames:

Proposed OSC Rule 48-501 "Trading During Distributions, Formal Bids and Share Exchange Transactions"

This letter is submitted in response to the Notice and Request for Comments concerning proposed OSC Rule 48-501 "Trading During Distributions, Formal Bids and Share Exchange Transactions" published at (2003) 26 OSCB 6157 (the "Proposed Rule").

1. Consistency in approach

Comment has been requested on the differences between the proposed amendments to UMIR and the Proposed Rule. While we understand that Market Regulation Services Inc. ("RS") and the OSC intend to make efforts to ensure that the proposed amendments to UMIR will parallel the provisions of the Proposed Rule to the greatest extent possible, we submit that in order to avoid uncertainty in the application of the two sets of requirements, there should be absolute consistency in the provisions of the Proposed Rule and the proposed amendments to UMIR, both in terms of their substantive application and in the use of terminology. In particular, we note the importance of ensuring that the restricted periods in the two sets of requirements are consistent such that a Participant could not be in a position of being asked to act for an issuer-restricted person in circumstances where the issuer-restricted person is permitted to bid for or purchase a restricted security while the Participant is not. Similarly, there must be consistency in the types of securities subject to, and exempted from, the two sets of requirements.

We also submit there should be the utmost uniformity between UMIR and the Proposed Rule, on the one hand, and Regulation M of the Securities and Exchange Commission (SEC), on the other hand.

2. Definition of "highly-liquid security"

In response to the specific request for comment with respect to the definition of highly-liquid security, we have the following comments to offer.

The term "highly-liquid security" is defined, in the first branch of the definition, as a listed security or quoted security that has traded an average at least 100 times per trading day with an average trading value of $1,000,000 per trading day during a specified 60-day period. This part of the definition provides that the requisite trading activity shall have occurred "on one or more *marketplaces* as reported on a consolidated market display". The terms "marketplace" and "consolidated market display" are not defined in the Proposed Rule. However, in this particular context there is no reason to conclude that these terms are intended to limit eligible trading activity to Canadian marketplaces. Nevertheless, we have been advised by staff of RS that the relevant trading activity must have occurred on a Canadian marketplace to be eligible. We respectfully submit that worldwide trading activity should be taken into account in determining whether a listed or quoted security should be exempt from underwriter trading restrictions.

In our view, worldwide trading volume would better indicate those securities that are widely followed by the investment community, and any manipulative or abnormal trading activity in such securities would quickly be noticed. In any event, manipulation to facilitate a distribution of these securities would be very expensive for an underwriter and its affiliates to effect. Regulation M operates on this basis as it takes into account worldwide trading volume in determining whether a security meets the U.S. $1 million average daily trading volume exception test in Regulation M. (In addition, the equity securities of the issuer must have a public float of U.S. $150 million, which is also determined on a global basis.) To the extent that the second branch of the definition is based on the corresponding exception in Regulation M, we submit that the approach followed in assessing liquidity under the first branch should be consistent.

3. Definitions of "issuer-restricted period" and "dealer-restricted period"

In paragraph (c) of each of the definitions of "dealer-restricted period" and "issuer-restricted period", the restricted period continues until the approval of the transaction by the security holders or the termination of the transaction by the issuer or issuers. As some transactions can be subject to security holder votes both by the issuer and the other party or parties to the transaction, we respectfully submit that these clauses should be amended to clarify that the relevant security holder vote or votes is by the security holders who will receive the offered security.

More substantively, paragraphs (b) and (c) of each of these definitions provide that the restricted period commences with the public announcement of the transaction. This differs from Regulation M where the restricted period begins on the day that the

exchange offer or proxy solicitation materials are disseminated to security holders. There does not appear to be any reason for the adoption of more restrictive provisions than those currently in effect in the U.S. We submit that consistency between Canadian and U.S. rules should be maintained unless there are very compelling reasons for adopting a different approach.

4. Definition of "offered security"

Paragraphs (b) and (c) of the definition of "offered security" refer to a security offered by an offeror in a securities exchange take-over bid and a security offered by an issuer in an issuer bid, respectively. These clauses will extend the application of the trading restrictions to take-over bids and issuer bids that are exempt from applicable securities law requirements, except to the extent that subsection 2.2(c) of the Proposed Rule is available in the case of certain exempt issuer bids. If this is the result, we respectfully submit that there may be difficulties applying the restrictions in the context of exempt transactions. For example, exempt take-over bids and issuer bids are unlikely to be the subject of a public announcement or a formal tender process. We respectfully request that consideration be given to further exempting transactions from the Rule if the transactions are exempt from applicable take-over bid or issuer bid requirements.

Paragraph (d) of the definition of "offered security" specifies that an offered security is one that would be issuable to security holders pursuant to an amalgamation, arrangement capital reorganization or similar transaction *in relation to which proxies are being solicited.* As these types of transactions may require proxies to be solicited from the security holders of either or both the offeror and the offeree issuer, we respectfully submit that this clause should be amended to clarify the circumstances in which the Proposed Rule is intended to apply, namely, where proxies are being solicited from the security holders who will be receiving the securities.

5. Definition of "connected security"

In the definition of "connected security", paragraph (b) appears to apply where the offered security derives its value from a listed or quoted security other than on the basis of an immediate conversion, exchange or other exercise right. However, unlike paragraph (a), which deals with securities related to offered securities that are immediately convertible or exchangeable, there is no exclusion for circumstances where the security being offered is significantly "out of the money", *i.e.*, greater than 110% of the best ask price of the underlying listed or quoted security at the start of the restricted period. We respectfully submit that this exclusion should be built into paragraph (b) of the definition of connected security. This would cover, for instance, synthetic convertible securities with at least a 10% conversion premium that are cash settled (i.e., the value of the underlying listed security is paid in cash), instead of physically settled by the issuance of the underlying listed security.

6. Meaning of "marketplace" and "marketplace rules"

These terms are used in a variety of places throughout the Proposed Rule but are not defined in the Proposed Rule. For purposes of UMIR, these terms are defined to relate solely to Canadian marketplaces and their approved rules. If it is intended that these terms be read or interpreted in a similarly restricted manner for purposes of the Proposed Rule, we respectfully submit that this should be further clarified in the Proposed Rule. This is particularly important given that "marketplace" is defined in National Instrument 21-101 without any geographical or other restriction.

7. Permitted stabilization activities – withdrawal of independent bid

Section 3.2 of the Proposed Rule will permit an underwriter in a distribution to bid for or purchase a restricted security at a specified maximum price during the restricted period. If the underwriter has a long position, or no position, the underwriter may not bid for or purchase the restricted security at a price exceeding the highest independent bid then entered on a marketplace. If the underwriter enters a bid on a marketplace equal to the highest independent bid then entered on a marketplace and the independent bid is subsequently withdrawn, we submit that the underwriter should be permitted to keep its bid open and to complete a purchase if the underwriter's bid is accepted on the marketplace. As drafted, the Proposed Rule would not appear to permit this.

8. Exemptions for exercise of conversion and other purchase rights

Sections 3.2 and 3.3 of the Proposed Rule contain exemptions from trading restrictions if the purchase of a restricted security results from the exercise of an option, right, warrant or similar contractual arrangement held or entered into prior to the commencement of the restricted period. We respectfully submit that this exemption should be extended to the exercise of an option, right, warrant, etc. where such right was acquired during the restricted period in accordance with the Proposed Rule. As recognized by the SEC in Regulation M, it makes sense to permit the exercise of a convertible security during the restricted period if the purchase of the convertible security is permitted under the Proposed Rule during the restricted period.

9. Research reports

Sections 4.1 and 4.2 of proposed Rule 48-501 are intended to provide exemptions from restrictions on the publication or dissemination of research relating to the issuer of a restricted security during the course of a distribution of that security. These exemptive provisions suggest that restrictions on publishing or disseminating research may be found in section 53 of the *Securities Act* and section 2.1 of the Proposed Rule. We submit that neither of these provisions contains express or otherwise clear restrictions on the publication or dissemination of research (especially section 53 of the Act). The

implication that these provisions do restrict the publication or dissemination of research is a significant concern because the nature and scope of the restrictions are unclear and the provisions purporting to provide exemptions therefrom are arguably too limited. We submit that rules intended to suppress the publication or dissemination of research during a distribution or other restricted period should be expressly stated and should provide for exemptions that permit investment dealers to continue to issue research in respect of covered issuers where material changes affecting the issuer would ordinarily call for the issuance of additional research. Furthermore, we submit that any proposed rules restricting the dissemination of research by an underwriter contemplating or engaged in a distribution and the exemptive relief provided in the circumstances should be consistent with other Canadian rules and regulations (such as IDA Policy 11) and U.S. rules and regulations of a similar nature.

We are please to have had this opportunity to offer you our comments on the Proposed Rule. If you have any questions or comments please contact Mark DesLauriers at 416.862.6709.

Yours very truly,

OSLER, HOSKIN & HARCOURT LLP
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