D. GRANT VINGOE
Partner
(416) 367-7377
vingoe.d.grant@dorsey.com

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VIA MESSENGER

Ontario Securities Commission
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario
Canada M5H 3S8
Attention: John Stevenson
Secretary to the Commission

Re: Request for Comment on Changes to Proposed OSC Rule 48-501

Dear Sir or Madam :

Thank you for the opportunity to comment on proposed OSC Rule 48-501.

The comments provided in this letter are my views alone and do not necessarily represent the views of others in my firm.

Our practice is limited to U.S. legal matters. My comments do not address technical aspects of the proposed rule arising under Canadian law.

The perspective on the proposal that I have sought to apply is based on the following principles:

1. Since the North American trading markets are increasingly integrated, with many securities trading in both Canadian and U.S. markets, trading rules in connection with distributions should be as similar in all relevant jurisdictions as possible, unless compelling local policy concerns involving market integrity can be demonstrated.

2. Compliance burdens should be reduced to the maximum extent possible by avoiding overlapping regimes that require traders and their supervisors and compliance personnel to seek to reconcile applicable requirements that differ in detail and interpretation.

3. The extra-territorial effect of the trading rules should be dealt with specifically in the proposed rule or commentary in order to avoid conflicting interpretations on this critical subject.

4. The trading rules should be designed to avoid placing Canadian investment dealers at a competitive disadvantage to U.S. investment banks in connection with underwriting, research and advisory activities, unless compelling local policy concerns involving market integrity can be demonstrated.

I have the following comments on the proposal based upon the foregoing principles[1]:

Restrictions on Dealer-restricted Persons

A. Persons included in the restriction.

(i) Public offerings conducted on an agency basis.

Regulation M relies on a definition of "distribution" that distinguishes ordinary trading from offerings having of larger magnitude involving the use of special selling efforts and methods. Regulation M does not provide a threshold under which best efforts offerings will not be considered distributions.

I believe the 10% threshold in subparagraph (a)(ii) of the definition of "dealer-restricted person" is inconsistent with the objectives sought to be achieved since best efforts offerings will frequently involve less liquid securities where the market impact of bids by dealer-restricted persons will be greatest. The 10% threshold has no relation to the potential market impact of such trading activity. I suggest that the more subjective test in Regulation M better serves the objectives of the proposed rule.

(ii) Private placements.

Regulation M does not have a general exemption for private placements, but only for Rule 144A offerings. Other private placements are subject to the same analysis that would apply to best efforts offerings noted above. Rule 144A offerings are limited to offers and sales to Qualified Institutional Buyers, generally defined as entities that own or invest on a discretionary basis at least U.S. $100 million in securities. Rule 144A is not available for offerings of securities that are listed on a U.S. stock exchange or certain convertible securities and warrants considered to be "fungible" with a listed security.

The foregoing limitations on the use of Rule 144A limit the possibility that trading activities that would otherwise be subject to Regulation M can be used for manipulative purposes in connection with such offerings.

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[1] Some of my comments are equally applicable to the equivalent UMIR rules that have been published for comment, but I have used proposed Rule 48-501 as the basis for my comments.

Regulation M is based on the view that a widespread, concerted private placement to a large number of individual, non-institutional Accredited Investors is tantamount to a public offering in terms of the potential effect of trading designed to inflate the market price.

I suggest that the principles-based test for determining whether a distribution is taking place provided in Regulation M is a very useful protection against manipulation in connection with such retail "accredited" offerings.

(iii) Advisers with a financial interest that depends on outcome of a transaction.

In the case of advisory roles, the formulation, "whose compensation depends on the outcome of the transaction" provides a potentially broad exception to the proposed rule. The dealer's desire to enhance its reputation in a successful bid can be a sufficient incentive for it to engage in trading that promotes the success of the transaction for which they have been retained.

Regulation M does not provide a similar exception to the restrictions imposed on distribution participants.

Soliciting dealer groups for transactions are not common in the United States. It is indeed uncommon to offer a per share fee to dealers who facilitate a tenders.

In recognition of the different Canadian practice regarding soliciting dealer groups, I suggest recasting the exception to provide a more limited exception for dealer-restricted persons whose compensation is limited to a customary fee for each security tendered.

(iv) Related persons subject to informational barriers.

This exception in subparagraph (b) of the definition of dealer-restricted person is substantially similar to the exception included in the definition of "affiliated purchaser" in Regulation M and should be adopted as proposed.

B. Period restrictions are in effect.

The OSC has chosen a uniform two business day period from the later of pricing or an understanding that the dealer will participate in the offering.

This differs from the present one and five day periods included in Regulation M. The SEC has also voted to propose making the period commence in the case of an IPO when the issuer reaches an understanding with the underwriter, rather than only five trading days before the pricing. Since the SEC interprets Regulation M as having worldwide effect, this latter change would affect non-U.S. trading in securities being publicly offered for the first time in the United States, as well as research activities in connection with securities to be issued in an IPO.

The OSC should carefully evaluate the economic analysis and related information to be published by the SEC in connection with its proposed amendments to Regulation M related to the commencement of trading restrictions before finalizing Rule 48-501.

The SEC has not published its Regulation M rule proposal as of the date of this letter.

The OSC's proposed rule concerning the commencement of the dealer-restricted period for M&A transactions, specifying the date of the relevant document is practically the same as under Regulation M. As in the past, since there can be an extended period between the announcement of a potential transaction and the date a circular is issued, securities regulators will have to continue to surveil for manipulative trading during this period as well.

The OSC's proposed interpretation of when the "selling process shall be considered to end" is similar to the criteria in Regulation M, except that the SEC Rule includes an explicit acknowledgment that securities allocated to a distribution participant's investment account at the end of a distribution are deemed to be distributed. The OSC should similarly acknowledge that an underwriter may end up holding otherwise unsold securities for investment, which may subsequently be resold without regard to these trading restrictions unless the subsequent transaction independently qualifies as a distribution.

C. Covered securities.

The Regulation M definition of "reference security" does not require that the offered security be "immediately" convertible into the reference security as does the OSC's proposed definition of "connected security". The Regulation M definition also does not contain an "out of the money" threshold where, if exceeded, the underlying security will not be deemed a reference security for a convertible security.

If a convertible security were the subject of a distribution but had a deferred conversion date, however short, it is certainly questionable whether the underlying security should not be deemed to be a connected security in determining permissible dealer activities. This is similarly the case with the 10% threshold for a convertible security or warrant determined based on potentially one quote at one point in time immediately before the restricted period.

I suggest that these provisions be conformed to Regulation M since dealer activities in these related securities would be suspect even if these conditions applied.

Exemptions -- Dealer-Restricted Persons

A. Stabilization.

I suggest for all the price variables for bids and last sale prices specified in the proposed rule, that the rule be modified to give effect to the prices indicated in the principal market, which should be defined to include any Canadian or U.S. stock exchange or NASDAQ. "Principal market" should be defined similarly to Regulation M as the "single securities market with the

largest aggregate reported trading volume for the class of securities during the 12 full calendar months preceding" either the filing of a prospectus or determination of the offering price as applicable.

I suggest a similar change in the definition of "highly liquid security" regardless of whether there is currently an offering subject to Regulation M.

This change would be in recognition of the interconnected U.S. and Canadian markets for interlisted securities.

B. Research.

The decision not to include an exemption for research distributed with reasonable regularity in the normal course of business involving "seasoned issuers" similar to the safe harbor afforded by SEC Rule 139(a) and Regulation M would place Canadian investment dealers at a significant disadvantage in relation to U.S. investment banks in cross-border transactions.

For example, in cross-border M&A transactions involving competing bids or potentially competing bids, U.S. investment banks will be able to publish in respect of the securities of qualified bidders in many cases when Canadian dealers cannot. Given that such research will in fact be relied upon by Canadian institutional investors, it seems impractical, and detrimental to Canadian investment dealers, to impose a prohibition in cases in which their U.S. competitors are unrestricted.

Competitive issues also arise in a non-M&A context where U.S. investment banks can be the first to publish updated research with respect to such seasoned issuers when Canadian dealers are constrained and have to await publication of a compilation report.

The existence of the safe harbor in Rule 139(a) is not viewed by U.S. investment banks as a complete basis to publish without further analysis concerning the contents and effect of the research. Notwithstanding the broad scope of the safe harbor contained in Rule 139(a), U.S. investment banks typically review all research issued during a distribution pursuant to their gray and restricted list procedures to protect against a possible violation of Rule 10b-5 and other anti-fraud rules that could arise if it were determined that the research was motivated by a desire to promote the success of the offering rather than to provide impartial analysis. Equally important is the need to maintain the credibility of the research function to buy side institutions. The dealer, if questioned by the SEC or an SRO, needs to be able to demonstrate that they had a process of review in place to protect against manipulation and insider trading.

I submit that Canadian investment dealers can be expected to engage in a similar analysis and that a complete prohibition in respect of single issuer reports for such seasoned issuers is not warranted.

If the OSC determines to retain only the limited exemption for compilation reports, I suggest consideration be given to the proposal outlined in the discussion of the extraterritorial application of the proposed rule below.

Extraterritorial Application of the Proposed Rule

The SEC takes the position that when a distribution occurs in the United States, the restrictions of Rule 101 apply to the activities of issuers and underwriters globally, even to activities conducted entirely outside the United States by non-U.S. persons.

The intended reach of proposed Rule 48-501 is unclear.

If the proposed rule is not intended to affect trading outside of Canada, then the objectives of the rule can be frustrated through trading conducted on U.S. or other non-Canadian markets.

If the proposed rule is intended to apply worldwide to issuers, Canadian-registered dealers and their related restricted persons, but not to foreign dealers which do not have Canadian affiliates, the proposed rule does not provide a level playing field for Canadian-based and foreign-based dealers. For example, as discussed above, U.S.-based dealers may be free to issue research in connection with an exchange offer by an issuer with "seasoned securities" where it is acting as an adviser to the offeror in circumstances where a Canadian dealer, or perhaps its U.S. affiliate, acting for a competing offeror would be prohibited from publishing. In many other instances involving seasoned issuers, U.S. firms will be able to publish in advance of Canadian dealers.

If the proposed rule is intended to apply to all dealers worldwide where there is a Canadian distribution, I question whether this goal has been sufficiently articulated by the OSC in its discussion concerning the proposed rule. In addition, I question whether the OSC could practically enforce such restrictions, involving trading and persons outside of Ontario. There may well be inherent limitations on the OSC's jurisdiction that limit the application of proposed Rule 48-501 to conduct in Ontario. If so, it would be appropriate to clearly state the limitations on the extraterritorial application of proposed rule to provide certainty with regard to applicable trading practices.

One solution to the jurisdictional issue would be for any offeror and Canadian managing underwriter(s) on behalf of the entire U.S. and non-U.S. syndicate members in any transaction involving a class of securities traded on any marketplace which is interlisted on any U.S. national securities exchange or the NASDAQ Stock Market, to be able to jointly make an election to be subject to SEC Regulation M, rather than Rule 48-501 or the equivalent rules governing a marketplace. Disclosure of the election could be required to be made in the relevant transactional documents and in a trading notice to participants in the marketplace.

By providing for such an election, the OSC would be allowing Canadian market participants to place themselves on an equal footing with U.S. market participants under one

consistent set of rules. The ability to make such an election could simplify compliance burdens and help avoid confusion concerning what rules apply in multiple North American trading venues.

This approach would be limited to interlisted securities, recognizing that Regulation M may not be appropriate in the case of securities that trade solely on Canadian markets. In the case of Canadian solely-traded securities, Rule 48-501 would be required to apply.

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Please do not hesitate to contact me if I can provide any further information concerning my comments.

Yours very truly,

D. Grant Vingoe

cc: Thomas Atkinson
President and CEO
Market Regulation Services Inc.